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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

PT PERTAMINA (PERSERO),

Petitioner,

v.

KARAHA BODAS COMPANY, L.L.C.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

HENRY WEISBURG
SHEARMAN & STERLING LLP
599 Lexington Avenue
New York, NY 10022
(212) 848-4000

DAVID E. KENDALL
CRAIG D. SINGER
Counsel of Record
THOMAS J. ROBERTS
KATHERINE M. TURNER
JOHN S. WILLIAMS
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, NW
Washington, DC 20005
(202) 434-5000

Attorneys for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Whether a federal district court has "ancillary" subject matter jurisdiction, after a judgment for money damages has been fully satisfied, to issue an anti-suit injunction barring foreign litigation.

2. Whether a federal district court exercising its limited authority under the treaty governing enforcement of international arbitration awards may issue an anti-suit injunction barring foreign litigation on the ground that the district court views the foreign lawsuit as seeking to relitigate matters decided in the underlying arbitration that were never considered or decided in the federal court.

3. Whether an injunction barring foreign litigation presents a grave intrusion upon principles of international comity that is justified only when necessary to protect the jurisdiction of the U.S. federal court or to further an important public policy.

STATEMENT REQUIRED BY RULES 14.1 AND 29.6

Pursuant to Supreme Court Rule 14.1(b), petitioner states that all parties to the proceedings in the United States Court of Appeals for the Second Circuit were:

Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, now known as PT Pertamina (Persero), Respondent-Appellant;

Karaha Bodas Company, L.L.C., Petitioner-Appellee; and

Ministry of Finance of the Republic of Indonesia, Interested Party.

Pursuant to Supreme Court Rule 29.6, Petitioner PT Pertamina (Persero), formerly known as Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, states that it is wholly owned by (but a separate juridicial entity from) the Government of the Republic of Indonesia.

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PETITION FOR A WRIT OF CERTIORARI

PT Pertamina (Persero) respectfully petitions this Court for a writ of certiorari to review the judgment entered on September 7, 2007 by the United States Court of Appeals for the Second Circuit.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 500 F.3d 111 (2d Cir. 2007), and is reproduced in the Appendix ("App.") at 1a. The opinion of the United States

District Court for the Southern District of New York is reported at 465 F. Supp. 2d 283 (S.D.N.Y. 2006) and is reproduced in the Appendix at 47a. The judgment of the United States District Court for the Southern District of New York is unreported and is reproduced in the Appendix at 42a.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on September 7, 2007. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, codified at 9 U.S.C. §§ 201-208, is reproduced in the Appendix at 287a.

The All Writs Act, 28 U.S.C. § 1651(a), states:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The supplemental jurisdiction statute, 28 U.S.C. § 1367(a), provides in relevant part:

> Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy unde. Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

The full text of 28 U.S.C. § 1367 is reproduced in the Appendix at 298a.

STATEMENT OF THE CASE

The United States District Court for the Southern District of New York entered a broad anti-suit injunction against PT Pertamina (Persero) ("Pertamina") precluding it, among other things, from prosecuting a lawsuit seeking damages for fraud in the Grand Court of the Cayman Islands – or anywhere else in the world – against Karaha Bodas Company, L.L.C. ("KBC"), a Cayman Islands special-purpose corporation. The Second Circuit affirmed the anti-suit injunction in substantial part, in an opinion that conflicts with decisions of other federal circuits in no fewer than three significant respects.

The matter in which the New York district court issued the anti-suit injunction was KBC's proceeding to execute on a Texas district court's judgment

confirming an international arbitration award. When the district court issued the injunction, proceedings were otherwise concluded and the full money judgment had been paid. The court's exercise of ancillary jurisdiction to issue and maintain the injunction after satisfaction of the judgment contradicts a recent decision of the Eighth Circuit on the identical issue, *Goss International Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355 (8th Cir. 2007). *Goss* is the subject of a separate petition for certiorari that we understand is being filed with this Court.

The Texas district court judgment, upon which the New York enforcement proceeding was based, confirmed KBC's international arbitration award pursuant to a summary proceeding dictated by an international treaty. Neither district court – indeed, no U.S. court – had occasion to consider the merits of the fraud claims that Pertamina asserted in the Cayman Islands. In concluding that the narrow U.S. enforcement proceedings could be a basis for enjoining foreign litigation, the Second Circuit directly contradicted an earlier Fifth Circuit decision arising out of this dispute.

In affirming the anti-suit injunction, moreover, the Second Circuit contributed to a pervasive conflict within the circuit courts regarding the standard for enjoining foreign litigation. Such injunctions signal profound disrespect for foreign courts, and are thus an affront to vital interests of international comity. This Court should limit their use to the rarest of circumstances.

A. The Arbitration Award and the Proceedings Below

Pertamina is an Indonesian state-owned corporation charged with exploring and exploiting geothermal energy resources in Indonesia. KBC contracted with Pertamina to locate geothermal resources in West Java and to sell electricity generated thereby ("the Project"). App. 4a. The Indonesian currency collapsed in 1997, and the Government of Indonesia suspended the Project.

In the period surrounding suspension of the Project, KBC submitted to Pertamina two Notices of Resource Confirmation and a Notice of Intent to Develop (collectively, the "Notices"), which Pertamina now believes were fraudulent. The first Notice (in September 1997) purported to confirm 75 MW of geothermal resources, C.A. App. A-679 ¶¶ 33-35; the second (three months later) asserted that KBC had confirmed sufficient geothermal resources that it reasonably expected to collect 210 MW of geothermal energy, *id.* at A-878 ¶ 40.

KBC subsequently commenced international arbitration proceedings. In December 2000, a Swiss arbitral tribunal issued a Final Award in favor of KBC against Pertamina, awarding $261,166,654.92.

Under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958 ("New York Convention" or "Convention"), 21 U.S.T. 2517, 330 U.N.T.S. 3, codified at 9 U.S.C. §§ 201-208, a tribunal's award is not self-executing but may be enforced by the courts of any signatory jurisdiction. KBC left no stone unturned in this

regard, filing enforcement proceedings in Hong Kong, Singapore, Canada, and the United States. App. 9a.

KBC filed its United States proceeding in the U.S. District Court for the Southern District of Texas. Pertamina opposed enforcement of the award on various grounds, most of them procedural. *See Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 294-307 (5th Cir. 2004), reproduced at App. 88a. Pertamina did not assert (because it did not then have proof) that KBC's Notices had fraudulently misrepresented the extent of geothermal resource that KBC had confirmed.

In December 2001, KBC obtained an order from the Texas court confirming the arbitration award. In February 2002, while that order was under appeal,[1] KBC filed the action below in the Southern District of New York to register the Texas judgment and commence execution proceedings. App. 10a.

The proceeding below, therefore, was limited to identifying funds held by Pertamina in New York and ordering their turnover, pursuant to the registered judgment. App. 52a-55a. The parties disputed whether Pertamina or the Government of Indonesia owned the funds within twenty-four bank accounts. Ultimately, funds were identified in New York bank accounts sufficient to cover the

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[1] The Texas district court's confirmation order ultimately was affirmed, *Karaha Bodas*, 364 F.3d 274, and this Court denied Pertamina's petition for a writ of certiorari in October 2004. *PT Pertamina (Persero) v. Karaha Bodas Co.*, 543 U.S. 917 (2004).

outstanding amount of the arbitration award. App. 63a-64a.

B. The Fifth Circuit's Decision Reversing KBC's Prior Anti-Suit Injunction

The anti-suit injunction appealed from is not the first that KBC has sought against Pertamina. Concurrent with the New York enforcement proceedings, KBC unsuccessfully pursued an anti-suit injunction in the Texas proceedings, seeking to enjoin an annulment action that Pertamina filed in Indonesia. *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 359-60 (5th Cir. 2003), reproduced at App. 155a. The Texas district court granted KBC's request, preliminarily enjoining Pertamina from seeking injunctive relief in the Indonesian action. *Id.* at 362.

The Fifth Circuit reversed the anti-suit injunction. The court articulated three reasons of particular importance here: *First*, under the New York Convention, a final order enforcing an arbitration decision is "not truly a decision on the merits; rather, it is an order to enforce an award resulting from litigation elsewhere, which is not necessarily given *res judicata* effect in foreign jurisdictions." *Id.* at 372. *Second*, it is not the job of a federal court, charged only with enforcing a foreign arbitration award, "to protect KBC from all the legal hardships it might undergo in a foreign country as a result of this foreign arbitration or the international commercial dispute that spawned it." *Id.* at 369.

Third, enjoining a party in an international arbitration enforcement proceeding is especially dangerous to the comity concerns at the core of the Convention. *Id.* at 372-73.[2]

C. Pertamina Uncovers Proof of KBC's Fraud and Files Suit in the Cayman Islands.

The documents underlying Pertamina's fraud claim first came to its attention in August 2005, when Pertamina's new Singapore counsel discovered twelve boxes of KBC documents that KBC's ex-staff had sent to Pertamina in November 2002. C.A. App. A-692 ¶ 70(b); A-1109; A-1845. The documents demonstrate that KBC knew it had not proven the geothermal resource it claimed in the Notices. Indeed, the documents reveal that at the time of the September 1997 Notice, KBC could not truthfully confirm 75 MW of geothermal resources; and that no meaningful additional drilling activity occurred before the December 1997 Notices, which predicted a 210 MW facility. *See id.* at A-701-10 ¶¶ 85-113; A-1168-1206.

By August 2005, the Texas confirmation action had concluded, and the New York turnover proceeding involved merely execution of the Texas judgment. *See* App. 10a. Pertamina therefore sought to raise the fraud claim in connection with KBC's then-pending enforcement proceedings in

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[2] On March 8, 2004, Indonesia's Supreme Court determined that Indonesian courts lacked jurisdiction over the annulment action. C.A. App. A-468.

Singapore and Hong Kong. Those attempts proved unavailing because KBC dismissed its Singapore proceeding and successfully postponed its Hong Kong proceeding.[3] Pertamina therefore filed a lawsuit for fraud in the Cayman Islands, where KBC itself is incorporated and cannot complain of being sued.

In the Cayman lawsuit, Pertamina claimed that KBC committed fraud in (a) sending Pertamina the Notices, and (b) submitting the Notice of Arbitration and procuring an arbitration award predicated on fraudulent representations. Pertamina sought damages as a result. C.A. App. A-1598 ¶¶ 6-7. It also sought equitable relief, including a preliminary injunction to prevent KBC from dissipating assets and, if successful at trial, an injunction preventing further enforcement of the arbitration award because it had been "vitiated" by fraud. *Id.*

D. The Anti-Suit Injunction and the Second Circuit Decision

Rather than defend against the Cayman action on the merits, or on grounds of res judicata or collateral estoppel, KBC instead moved the New York district court on September 21, 2006 for an anti-suit injunction prohibiting Pertamina from prosecuting the Cayman action or any similar proceeding worldwide. By this time, the turnover proceedings in the district court were largely completed; this Court denied certiorari on October 2, 2006, *PT Pertamina*

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[3] On October 9, 2007, the intermediate appeals court in Hong Kong ruled against Pertamina; Pertamina has filed a notice that it will seek to appeal to Hong Kong's highest court.

(Persero) v. Karaha Bodas Co., 127 S. Ct. 129 (2006), and the district court issued final turnover orders on October 6 and November 15. Pertamina promptly complied with these orders and the judgment was fully satisfied. App. 63a-64a.

On December 8, 2006, the district court released an Opinion granting KBC's motion for a global permanent anti-suit injunction. App. 47a. The district court's final order permanently enjoins Pertamina from (among other things) pursuing its fraud claims in the Cayman Islands action or in any other court or tribunal. App. 43a-45a.

Pertamina timely appealed to the Second Circuit from the anti-suit injunction.[4] Meanwhile, the Eighth Circuit decided *Goss*, which held under analogous circumstances that a district court lacked ancillary jurisdiction to enjoin a foreign lawsuit after payment of the judgment. 491 F.3d at 368-69. The Second Circuit ordered supplemental briefing in light of *Goss*.

In an opinion dated September 7, 2007, the Second Circuit affirmed the district court's anti-suit injunction with minor modifications. Disagreeing with the Eighth Circuit, the court held that federal district courts have ancillary jurisdiction to enjoin foreign litigation even after payment of a judgment. The Second Circuit further held that, under the standard first articulated in *China Trade &*

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[4] The district court entered a stay pending appeal, requiring KBC to hold disputed funds Pertamina had paid pursuant to the final turnover orders. The Second Circuit on February 13, 2007 lifted that stay, and this Court denied Pertamina's emergency application the next day. KBC has disbursed the funds. App. 15a.

Development Corp. v. M.V. Choong Yong, 837 F.2d 33, 35-36 (2d Cir. 1987), the anti-suit injunction was appropriate. App. 19a-35a.

Characterizing the Cayman action as a challenge to the arbitration award, the court reasoned that the U.S. enforcement proceedings were "dispositive" of the issues in the Cayman lawsuit – a threshold requirement of the *China Trade* test. App. 22a. The court acknowledged that the Fifth Circuit's decision reversing KBC's prior anti-suit injunction had held that the U.S. court, acting as a secondary-jurisdiction tribunal under the New York Convention, does not have the same interest in protecting its judgments from international interference as it does in the typical case it adjudicates. App. 26a-27a. The Second Circuit sought to distinguish the Fifth Circuit's decision, however, on the ground that (a) since the Fifth Circuit's decision, additional federal judgments enforcing KBC's award had been entered, and (b) as the court saw it, the Cayman Islands has "no arguable basis for jurisdiction to adjudicate rights and obligations of the parties with respect to the [arbitration award]." App. 28a-31a.

The Second Circuit further determined that the anti-suit injunction was warranted because (a) the Cayman action interferes with the jurisdiction of the U.S. courts, (b) the Cayman action impairs the important public policy in favor of arbitration, and (c) the Cayman action is "vexatious." App. 31a-34a.

In affirming the injunction, the Court "modif[ied] it slightly to clarify that [it] has no effect on confirmation proceedings contemplated by the New York Convention in other jurisdictions." App. 41a. The Court also noted that Pertamina, were it to

identify a good-faith basis to pursue annulment litigation in Switzerland, could return to the New York district court for permission to seek such relief. *Id.* Neither "modification" permits Pertamina to pursue its affirmative damages claim for fraud.[5]

REASONS FOR GRANTING THE WRIT

This Petition presents three separate but related issues as to which the federal circuits are in conflict. These significant issues, severally or in combination, warrant certiorari.

The Eighth and Second Circuits have reached opposite conclusions regarding whether, after an award of damages has been satisfied, a federal court retains ancillary subject matter jurisdiction to enjoin proceedings. The Eighth Circuit's view is consistent with this Court's recent ancillary jurisdiction opinions: after satisfaction of the judgment, ancillary jurisdiction is lacking. The Second Circuit rejected this reasoning.

The Second Circuit's holding also conflicts with the Fifth Circuit's decision regarding the propriety of a New York Convention enforcement court issuing an anti-suit injunction. Enforcement proceedings under the Convention are summary in nature, and sharply

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[5] The anti-suit injunction required Pertamina to dismiss its Cayman action. The Second Circuit denied a stay, and the Cayman action accordingly has been dismissed. In the event the Court grants certiorari and the anti-suit injunction ultimately is reversed, Pertamina may seek leave to re-file its Cayman action or may file suit elsewhere to pursue its fraud claim.

restrict the grounds on which a defendant can object. Nevertheless, and despite the Fifth Circuit reversing an anti-suit injunction in fundamentally indistinguishable circumstances, the Second Circuit treated the enforcement and execution proceedings in this case as judgments on the merits.

Finally, the Second Circuit's decision contributes to the widespread confusion among the circuit courts regarding the proper standard to be applied in considering whether to issue an anti-suit injunction. Nine circuits have articulated various standards, which fall into at least three discrete and irreconcilable approaches. The circuits' respective tests differ most dramatically as to how much respect is afforded to the interest of international comity.

This Court should swiftly resolve these disagreements. As the world economy grows, international litigation is becoming both more sophisticated and widespread. Judging by the many recent court decisions, *see infra*, litigants are increasingly turning to preemptive anti-suit injunctions. Yet, as the global marketplace increases in size, the need to respect foreign tribunals must keep pace. This is nowhere more evident than in lawsuits arising out of the New York Convention. U.S. litigants and U.S. courts rely on the mutual goodwill among signatory nations to adjudicate disputes fairly and respect previous rulings.

No less pressing is the need to ensure that the limits of federal subject matter jurisdiction are well understood and consistently applied. The Second Circuit's decision greatly expands ancillary jurisdiction by allowing federal courts to continue exercising control over parties whose business before

the courts has concluded – and consequently, to exercise control over proceedings in foreign courts. Ancillary jurisdiction, as this Court's prior decisions make clear, should be limited to what is necessary for the court's function. The post-judgment anti-suit injunction entered by the district court most assuredly was not within the narrow range of situations for which ancillary jurisdiction is reserved.

In short, a writ of certiorari should be granted to clarify the breadth of post-judgment ancillary jurisdiction and to determine the standards under which a district court may enjoin foreign litigation.

I. THE SECOND AND EIGHTH CIRCUITS ARE IN CONFLICT REGARDING THE "ANCILLARY" JURISDICTION OF A DISTRICT COURT TO ENJOIN PROCEEDINGS AFTER SATISFACTION OF A JUDGMENT.

The Second Circuit's decision in this case squarely conflicts with the Eighth Circuit's decision in *Goss*, 491 F.3d 355, on an important question of federal subject matter jurisdiction. In *Goss*, which we understand is before this Court on petition for certiorari, the Eighth Circuit reversed a district court's anti-suit injunction against a foreign action that the court perceived to be a threat to its jurisdiction. The Eighth Circuit held that "the district court retained ancillary enforcement jurisdiction [only] *until* satisfaction of the judgment," *id.* at 365, and because the judgment had been paid, the anti-suit injunction could not stand, *id.* In contrast, the Second Circuit held, after specifically

considering *Goss*, that the New York district court had ancillary jurisdiction to restrain foreign litigation even after Pertamina had paid the judgment. App. 37a-38a. This Court should grant certiorari to resolve this circuit split and to decide the important question of whether post-judgment anti-suit injunctions are within federal courts' ancillary subject matter jurisdiction.

A. The Eighth Circuit Holds that Ancillary Jurisdiction Does Not Extend to Post-Judgment Anti-Suit Injunctions.

In *Goss*, a United States company obtained a damages judgment against a Japanese manufacturer under the Antidumping Act of 1916, 15 U.S.C. § 72 (repealed 2004). 491 F.3d 356. The Japanese company then informed the district court that it intended to file suit in Japan under a "claw back statute" under which the company could recover as damages the amount of any judgment against it under the U.S. Antidumping Act. The United States company sought an anti-suit injunction from the federal district court. *Id.* at 359. As in this case, the prevailing party in *Goss* argued that the foreign action would undo the effects of the domestic judgment it had obtained. *Id.* The district court agreed, holding that the Japanese action was "a direct attack on this court's judgment in favor of Goss and a frontal assault on the jurisdiction of [the] court and the federal judiciary as a whole." *Goss Int'l Corp. v. Tokyo Kikai Seisakusho, Ltd.*, 435 F. Supp. 2d 919, 929 (N.D. Iowa 2006).

The Eighth Circuit reversed. The court first observed that while anti-suit injunctions are authorized by the All Writs Act, 28 U.S.C. § 1651(a), "the Act does not create an independent source of federal jurisdiction." 491 F.3d at 364. Prior to payment of the judgment, the *Goss* court reasoned, the district court had jurisdiction to enjoin the Japanese company from pursuing the foreign litigation. *Id.* at 365. Once the judgment was paid, however, "the jurisdictional circumstances . . . changed because there [was] no longer an outstanding judgment to protect." *Id.* at 368. The *Goss* court concluded that "[n]either the All Writs Act nor the court's ancillary enforcement jurisdiction provides the district court with a separate source of jurisdiction . . . under these circumstances." *Id.* at 365. The Eighth Circuit relied on this Court's decision in *Peacock v. Thomas*, 516 U.S. 349 (1996), which "caution[ed] against the exercise of jurisdiction over proceedings that are entirely new and original, or where the relief [sought is] of a different kind or on a different principle than that of the prior decree." *Id.* at 358 (internal quotation marks and citation omitted).

B. The Second Circuit's Decision Squarely Disagrees with the Eighth Circuit's, Creating a Circuit Split on a Significant Issue of Subject Matter Jurisdiction that This Court Should Resolve.

The decision below specifically addressed, at some length, the Eighth Circuit's *Goss* decision – and unambiguously disagreed. App. 37a-38a. Recognizing that, as in *Goss*, the district court's judgment had been paid and its proceedings were at an end, the Second Circuit nonetheless upheld the anti-suit injunction, reasoning that "federal courts have continuing jurisdiction, grounded in the concepts of *res judicata* and collateral estoppel, to enjoin a party properly before them from relitigating issues in a non-federal forum that were already decided in federal court." App. 38a. The Second Circuit emphasized that "[t]his source of jurisdiction remains *even after a judgment has been satisfied* . . . ." *Id.* (emphasis added). The court made no attempt to reconcile its holding with *Goss*, and indeed, they are irreconcilable.

The present case is a perfect opportunity for this Court to resolve this clear circuit split on an issue of critical importance to the federal courts. As the number of lawsuits waged in multiple countries grows with the ever-expanding global economy, U.S. courts are likely to face increasingly complicated litigation postures that raise thorny jurisdictional issues. Just so here: the Eighth and Second Circuits faced the identical jurisdictional question within months of each other and reached opposite conclusions.

In addition to its international character, this case warrants certiorari to address the scope – if any – of a court's ancillary jurisdiction after a judgment has been satisfied. Ancillary jurisdiction is a species of subject matter jurisdiction, which goes to the heart of the judicial power. *See Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884). The presence of jurisdiction is the "first and fundamental question'" in any action or appeal, and is an issue that a federal court is "'bound to ask and answer for itself, even when not otherwise suggested." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quoting *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900)). In part because of the central importance of subject matter jurisdiction, the scope of ancillary jurisdiction is a recurring and confounding problem in the lower federal courts. Indeed, the Second Circuit below commented that the caselaw on the topic was "hardly a model of clarity." App. 38a (quoting *Garcia v. Teitler*, 443 F.3d 202, 208 (2d Cir. 2006)); *see also Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379 (1994) ("The doctrine of ancillary jurisdiction can hardly be criticized for being overly rigid or precise . . . ."). For these reasons, this Court's guidance is especially necessary to "carefully guard[ ]" against the federal courts' expansion of their own power. *Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17 (1951).

C. The Second Circuit's Judgment Is Incorrect and Should Be Reversed.

The district court lacked ancillary jurisdiction to maintain its anti-suit injunction. Federal courts are

to "presume[] that a cause lies outside this limited jurisdiction and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen*, 511 U.S. at 377 (citation omitted). This Court accordingly has limited ancillary jurisdiction to two instances: "(1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent, and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." *Id.* at 379-80 (citations omitted). In this case, the district court's injunction cannot be justified on grounds of "factual[] interdependen[ce]" because this basis for ancillary jurisdiction applies only prior to judgment. *Peacock*, 516 U.S. at 355 ("once judgment was entered," the ability of a single court to resolve "factually intertwined issues vanished").

Following satisfaction of a judgment, therefore, ancillary jurisdiction to issue an anti-suit injunction may be justified only if the injunction enables a district court to "function successfully." This basis for ancillary jurisdiction too is exceedingly narrow and does not extend to the anti-suit injunction in this case. In *Kokkonen*, the Court held that there was no ancillary jurisdiction over an alleged violation of a settlement agreement after the district court had dismissed the case. 511 U.S. at 380-81. In *Peacock*, the Court found no ancillary jurisdiction over claims brought by a judgment creditor to collect against an officer and shareholder of the judgment debtor who had transferred the assets to himself. 516 U.S. at 356-59. When, in the past, this Court has found ancillary jurisdiction to enjoin a proceeding following entry of judgment, the judgments were ongoing orders in need of continued protection. *See Dugas v.*

Am. Sur. Co. of N.Y., 300 U.S. 414, 428 (1937) (modifying closely related injunction to enjoin related proceeding); *Local Loan Co. v. Hunt*, 292 U.S. 234, 239 (1934) (protecting bankrupt person from subsequent suit regarding debt for which he received bankruptcy protection); *Dietzsch v. Huidekoper*, 103 U.S. 494, 497 (1880) (following equitable suit in replevin assigning ownership of property, enjoining attempt to recover "the equivalent to an actual return of the replevied property").

In the recent *Kokkonen* and *Peacock* decisions, this Court emphasized that ancillary jurisdiction extends only to matters truly necessary to protect the court's authority to manage the proceedings before it. In rejecting jurisdiction to adjudicate violation of a settlement agreement, *Kokkonen* limited enforcement jurisdiction to "what courts require in order to perform their functions." 511 U.S. at 380. Because the agreement was not incorporated in the district court's dismissal order, the order was "in no way flouted or imperiled by the alleged breach of the settlement agreement." *Id.* The *Peacock* Court observed that ancillary jurisdiction over supplemental proceedings was strictly limited. "Our recognition of these supplementary proceedings has not . . . extended beyond attempts to execute, or to guarantee eventual executability of, a federal judgment." 516 U.S. at 357. In so holding, the *Peacock* Court recognized that this might mean that some judgments would not be paid. *Id.* at 359 ("The Rules cannot guarantee payment of every federal judgment."). But as long as a federal court "protect[s] a judgment creditor's ability to execute on a judgment, the district court's authority is adequately preserved." *Id.*

These recent decisions are consistent with 28 U.S.C. § 1367, which confers supplemental jurisdiction over disputes that "form part of the same case or controversy under Article III of the United States Constitution" as the claims for which there is original jurisdiction. *Id.* This Court recently emphasized that, for Article III purposes, a case or controversy must "admi[t] of *specific relief* through a decree of a *conclusive character*." *MedImmune, Inc. v. Genentech, Inc.*, 127 S. Ct. 764, 771 (2007) (emphases added) (quotation omitted). When a judgment calls for money damages, and that judgment is paid, the case or controversy is concluded. Any further dispute between the parties, especially one seeking an entirely different kind of relief, such as an anti-suit injunction, is not part of the same case or controversy. *See Peacock*, 516 U.S. at 358 (expressing caution for exercises of ancillary jurisdiction over subsequent disputes premised on a different principle or seeking different forms of relief).

Applying these precedents to this case, the district court lacked ancillary jurisdiction. After adjudicating a narrow proceeding regarding the ownership of certain bank accounts, the district court ordered the turnover of money damages. The judgment included no ongoing injunctive relief, and the district court's judgment accordingly was fully effectuated when the money was paid. *See Goss*, 491 F.3d at 368 n.9 (payment of a money judgment ends need for ancillary enforcement jurisdiction). The district court itself recognized that the judgment was "finally satisfie[d]." App. 63a. Accordingly, the district court's turnover order would not be "flouted or imperiled," *Kokkonen*, 511 U.S. at 380, by

Pertamina's Cayman lawsuit for damages. In contrast to the Second Circuit below, the Eighth Circuit in *Goss* correctly concluded that, having taken the steps to ensure that the judgment was satisfied, the district court's ancillary enforcement jurisdiction was at an end and the anti-suit injunction was improper.

II. THE SECOND AND FIFTH CIRCUITS ARE IN CONFLICT REGARDING ANTI-SUIT INJUNCTIONS ISSUED BY COURTS EXERCISING SECONDARY JURISDICTION UNDER THE NEW YORK CONVENTION.

The Second Circuit held that the federal judgments at issue – the Texas district court's confirmation of the arbitral award and the New York district court's enforcement of it – were "dispositive" of Pertamina's Cayman Islands fraud claims and justified an anti-suit injunction. App. 22a. The court so held even though the Texas and New York district courts never heard or decided the merits of those claims.[6] *See id.* The Second Circuit reasoned,

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[6] The Second Circuit noted that the Fifth Circuit, in affirming the Texas district court's confirmation order, considered a claim by Pertamina that the arbitration award was procured by fraud. App. 23a. That claim had nothing to do with Pertamina's fraud claim presented in the Cayman Islands. Rather, the Fifth Circuit examined whether KBC's failure to disclose a political insurance policy provided a basis for refusing to enforce the award as contrary to public policy under Article V(2)(b) of the Convention. *Karaha Bodas*, 364 F.3d at 306-07. That court never considered the fraud allegations relating to KBC's Notices raised in the Cayman proceeding.

because Pertamina's fraud claims were (so it found) decided in the Swiss arbitration,[7] and the arbitral ruling was enforced by the U.S. federal courts, those courts had "actually decided" the claims raised in the Cayman action. *Id.* The Second Circuit thus regarded the federal courts' confirmation and enforcement orders under the Convention as equivalent to a federal adjudication on the merits of all of the issues in the underlying arbitral proceeding – even issues that the federal courts never heard or decided.

The Second Circuit's holding directly conflicts with the Fifth Circuit's conclusion, in the prior proceeding between these parties, that the Texas district court's anti-suit injunction was improper in light of the court's limited role under the New York Convention. *See Karaha Bodas*, 335 F.3d 357. The Fifth Circuit reasoned that confirmation and enforcement proceedings in courts of secondary jurisdiction are *not* judgments on the merits, are not necessarily entitled to res judicata effect, and do not imbue a federal court with the same interest in protecting its judgments as would the typical case. *Id.* at 366-73. In addition to creating a circuit conflict, the Second Circuit's decision represents an unprecedented assertion of federal authority in the international arbitration context, an arena in which anti-suit injunctions are particularly inappropriate

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[7] This issue was vigorously contested below, and Pertamina believes the Second Circuit erroneously determined that Pertamina's fraud claims were decided in the Swiss arbitration. App. 23a. While Pertamina argued that KBC's damages claims were grossly inflated, it did not assert an affirmative claim for fraud, nor did it then possess the documents that underlie its claims in the Cayman action. App. 50a-51a; C.A. App. A-1636.

and offensive to international comity. As this Court has emphasized, "[t]he utility of the Convention in promoting the process of international commercial arbitration depends upon the willingness of national courts to let go of matters they normally would think of as their own." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 639 n.21 (1985).

A. The Fifth Circuit Held that an Anti-Suit Injunction Was Inappropriate in Light of the Limited Role of a U.S. Court Acting as a Secondary Enforcement Jurisdiction Under the Convention.

The Fifth Circuit typically applies a permissive standard for issuing anti-suit injunctions against foreign proceedings. *See infra*, part III.B; *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 626-27 (5th Cir. 1996). It applies a very different standard, however, to anti-suit injunctions issued from Convention enforcement proceedings. In *Karaha Bodas*, an earlier proceeding between these parties described at pp. 7-8, *supra*, the Fifth Circuit properly looked to the structure of the Convention to determine whether to enjoin Pertamina's Indonesian annulment proceeding. *See* 335 F.3d at 368.

First, the Fifth Circuit noted that the Convention "assign[s] different roles to national courts to carry out the aims of the treaty." *Id.* A "primary jurisdiction" is one in which, or under the law of which, an arbitral award is made; a "secondary jurisdiction" is one in which recognition and

enforcement of an award is sought. *Id.* at 364. To establish a *prima facie* basis for enforcement in a secondary jurisdiction, the recipient of the award need only present the authenticated award and the original arbitration agreement to the enforcement court pursuant to Article IV of the Convention. *Id.* at 368. Once the litigant meets that requirement, the court of secondary jurisdiction *must* enforce the award unless the party opposing enforcement establishes one of seven narrow grounds to refuse enforcement. 9 U.S.C. § 201, note, Art. V; *see Karaha Bodas*, 335 F.3d at 368; *Admart AG v. Stephen & Mary Birch Found., Inc.*, 457 F.3d 302, 307 (3d Cir. 2006) (secondary jurisdiction court's role "is limited – it must confirm the award unless one of the grounds for refusal specified in the Convention applies"). "[T]he efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal . . . ." *Mitsubishi Motors*, 473 U.S. at 638.

Second, the Fifth Circuit observed that the Convention contemplates (as occurred here) that there will be multiple enforcement and/or nullification actions in jurisdictions worldwide, and courts considering the award are entitled "to conduct their own independent enforcement analyses." *Karaha Bodas*, 335 F.3d at 370. A district court's judgment under the Convention merely holds that the arbitration award is enforceable within the *United States*. *See id.* at 370. Accordingly, the integrity of a U.S. court's enforcement order is not threatened when other courts "address[] the same or similar legal bases against enforcement and confirmation." *Id.* at 370. For this reason, the decisions of the enforcement court are "not

necessarily given *res judicata* effect in foreign jurisdictions" because such decisions "only enforce[], or refuse[] to enforce, awards arbitrated elsewhere." *Id.* at 372 & n.59.

Accordingly, the Fifth Circuit reasoned, an anti-suit injunction issued by a court of secondary jurisdiction is "likely . . . to demonstrate an assertion of authority not contemplated by the . . . Convention." *Id.* at 373. Because of the structure of the Convention, an "order to enforce an award resulting from litigation elsewhere" is "*not truly a decision on the merits.*" *Id.* at 372 (emphasis added); *accord Telcordia Tech Inc. v. Telkom SA Ltd.*, 458 F.3d 172, 178 (3d Cir. 2006) (distinguishing enforcement of arbitral award under the Convention from an "adjudication on the merits").

B. The Second Circuit Held that It Was Appropriate To Issue an Anti-Suit Injunction To Protect the District Court's Enforcement of the Same New York Convention Arbitral Award.

Though acknowledging that the United States was operating as a secondary jurisdiction under the Convention, the Second Circuit nevertheless treated the district courts' confirmation and enforcement as decisions on the merits justifying an extraordinary anti-suit injunction. App. 22a-23a.[8] This conclusion

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[8] The Second Circuit modified the injunction so that it did not apply to litigation in Switzerland or confirmation proceedings under the Convention. *See* App. 28a-29a. This limitation in no way reconciles the court's ruling with the Fifth

is inconsistent with the limited function the U.S. district courts were allowed to and did perform – ensuring that the Article IV paperwork requirements were met and addressing Pertamina's objections on the limited grounds set forth in Article V.[9]

The Second Circuit's decision is directly in conflict with the Fifth Circuit's. While the Second Circuit treated the enforcement decision as a judgment on the merits that had "actually decided" any issues presented in the arbitration, *id.*, the Fifth Circuit reached the opposite conclusion and found that an enforcement judgment is not threatened even by a direct challenge to the underlying arbitration in a foreign jurisdiction. *Karaha Bodas*, 335 F.3d at 370. This Court's guidance is necessary to resolve this conflict over whether and under what circumstances a court of secondary jurisdiction can exercise its equitable authority to issue an anti-suit injunction against a foreign proceeding.

The Second Circuit suggested two bases for distinguishing the Fifth Circuit's contrary decision. Neither resolves the conflict. First, the Second Circuit suggested that the procedural posture of the two cases differed. *See* App. 28a. In the Fifth Circuit

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Circuit's, as the Second Circuit unquestionably would have enjoined the Cayman lawsuit even if it had been styled an "annulment" action, like the Indonesian action at issue in the Fifth Circuit case. Indeed, the New York district court's anti-suit injunction, as affirmed by the decision below, by its plain terms *would* enjoin an annulment action in the Cayman Islands or Indonesia. App. 43a-45a.

[9] The Fifth Circuit, in its later opinion affirming enforcement, noted that "[i]t is clear that the district court had secondary jurisdiction and considered *only whether to enforce the Award*." *Karaha Bodas*, 364 F.3d at 287 (emphasis added).

case, it noted, the Texas district court had only confirmed the award, whereas the New York district court had issued an enforcement order (based on that confirmation) for Pertamina to turn over $319 million. *Id.* The Second Circuit did not explain why a turnover order speaks more to the merits of the underlying arbitration than does a confirmation order; if anything, the New York proceeding had even less to do with the merits than did the Texas proceeding. In any event, the Fifth Circuit's ruling, that an "order to enforce an award resulting from litigation elsewhere" is "*not truly a decision on the merits*," *Karaha Bodas*, 335 F.3d at 372 (emphasis added), is equally applicable to either the New York or Texas proceeding.

Second, the Second Circuit distinguished the Fifth Circuit's decision on the ground that Pertamina had a "colorable argument" that the enjoined Indonesian proceedings may have been permissible under the Convention, while the Cayman proceeding enjoined by the New York district court was not brought under the auspices of the Convention. App. 29a-30a. But it is evident from the Fifth Circuit opinion that the "colorable argument" was not a factor in its decision. It held that the Indonesian action did not impinge on the Texas district court's confirmation and enforcement jurisdiction, even if that action were not authorized by the Convention, and even if that action were otherwise improper:

> [E]ven if the Indonesian court acted wrongly in its decision to annul the Award as a court of purported primary jurisdiction under the . . . Convention, we need not directly address the

> propriety of that court's injunction and annulment. Contrary to the district court's conclusions, legal action in Indonesia, regardless of its legitimacy, does not interfere with the ability of U.S. courts, or courts of any other enforcement jurisdictions for that matter, to enforce a foreign arbitral award.

Karaha Bodas, 335 F.3d at 372.

C. This Court Should Grant Review To Resolve This Conflict and To Clarify the Circumstances (If Any) When an Enforcement Court May Enjoin Foreign Litigation.

While the conflict between the Second and Fifth Circuits arises from the present dispute, the significance of the courts' disagreement extends beyond this matter and affects all instances in which courts of secondary jurisdiction operating under the Convention consider anti-suit injunctions. Under the Second Circuit's decision, a court issuing a post-judgment order of confirmation or enforcement, following very limited review of the underlying arbitration, nevertheless can and should protect that order against foreign lawsuits as its own judgment on the merits affirming all aspects of the underlying arbitration. In the Fifth Circuit, by contrast, such a court must recognize its limited role under the Convention and, accordingly, must refrain from interfering with foreign proceedings pertaining to the arbitration. This Court should grant certiorari to

clarify the role of a court of secondary jurisdiction and the circumstances under which such a court can enjoin foreign litigation.

The Second Circuit's approach permits U.S. courts of secondary jurisdiction to impose their views on other courts worldwide, who otherwise would be empowered, and fully competent, to reach their own conclusions about the claims before them. This result conflicts with the narrow review power assigned to a court of secondary jurisdiction under Article V of the Convention, which requires that "substantive review at the award-enforcement stage remain minimal." *Mitsubishi Motors*, 473 U.S. at 638.

III. THE CIRCUITS ARE IN CONFLICT REGARDING THE PROPER STANDARD FOR ISSUING FOREIGN ANTI-SUIT INJUNCTIONS.

The decision below reaffirmed the Second Circuit's *China Trade* standard, which recognizes that anti-suit injunctions "effectively restrict[] the jurisdiction of the court of a foreign sovereign," and that, therefore, such injunctions must be "used sparingly" in due regard for international comity, *China Trade*, 837 F.2d at 35-36 (internal quotation marks omitted). *See* App. 16a-17a. Under this standard, the commencement of a foreign proceeding between the same parties "does not, without more, justify enjoining a party from proceeding in the foreign forum." *China Trade*, 837 F.2d at 36. Rather, the court first should consider whether the two actions share the same parties and whether the

U.S. action is "dispositive" of the foreign proceeding; if so, the court then should examine five factors in determining whether to issue an injunction. App. 16a-17a.

The Second Circuit's decision contributes to a recognized and substantial conflict among the circuits,[10] important to international commerce and foreign relations, regarding the standard under which a U.S. federal court may enjoin a non-U.S. lawsuit. The Second Circuit, like the D.C., Third, Sixth, and Eighth Circuits (and, to a lesser extent, the First Circuit), recognizes that an anti-suit injunction, in and of itself, impairs international comity. Its standard is fundamentally more restrictive than those circuits, including the Fifth, Seventh, and Ninth Circuits, that conclude that equitable factors such as the vexatiousness and oppressiveness of duplicative foreign litigation, which are likely to be present in any parallel proceeding, may be sufficient to override comity concerns.

The Second Circuit's standard is far broader, however, than the standard in the Third, Sixth and Eighth Circuits, because it considers such equitable factors, whereas these most restrictive circuits permit anti-foreign suit injunctions only when necessary to protect the jurisdiction of the U.S. court or to prevent evasion of an important public policy. Under that restrictive standard, the anti-suit

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[10] *See, e.g., Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 17-18 (1st Cir. 2004) (describing circuit split).

injunction against Pertamina in this case should not have issued.

In all, nine federal circuits have weighed in on the proper standard for foreign anti-suit injunctions. They have applied fundamentally inconsistent standards, and reached fundamentally inconsistent results, in an area of great significance to the role of U.S. courts on the international stage. Absent review by this Court, this longstanding and intractable divergence will persist, and courts and litigants worldwide will remain uncertain as to the circumstances under which a U.S. court may enjoin foreign proceedings.

A. Six Circuits Apply Restrictive Standards of Varying Degrees.

A majority of the circuits holds that anti-suit injunctions should issue only in the rarest and most compelling circumstances. These courts emphasize that, even though such injunctions operate only on the parties, "they effectively restrict the foreign court's ability to exercise its jurisdiction," and thus necessarily implicate international comity. *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 927 (D.C. Cir. 1984).

1. Three circuits apply the most restrictive test, considering only whether the foreign lawsuit threatens federal jurisdiction or impairs an important public policy.

Within this majority, the Sixth, Eighth, and Third Circuits are more restrictive than the others. The Sixth Circuit considers "*only* two factors" – protecting jurisdiction and important public policies of the forum – in determining whether an injunction may issue. *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349 (6th Cir. 1992) (emphasis added). Similarly, the Eighth Circuit recently decided that the standard "should focus on (1) whether [the foreign action] . . . prevents United States jurisdiction or threatens a vital public policy, and (2) whether the domestic interests outweigh concerns of international comity." *Goss*, 491 F.3d at 361 n.4. The Third Circuit, while not expressly stating that those two factors are exclusive, has not recognized any other grounds that could, standing alone, justify restraining foreign litigation. *See Stonington Partners, Inc. v. Lernout & Hauspie Speech Prods. N.V.*, 310 F.3d 118, 127-29 (3d Cir. 2002); *Gen. Elec. Co. v. Deutz AG*, 270 F.3d 144, 160-61 (3d Cir. 2001).

2. Three circuits – including the Second Circuit below – also consider other equitable factors.

In contrast, the D.C., Second, and First Circuits, in varying degrees, permit consideration of other

factors. Still, all three courts apply a strong presumption against anti-suit injunctions.

The D.C. Circuit holds that "[t]he equitable circumstances surrounding each request for an injunction must be carefully examined to determine whether . . . the injunction is required to prevent an irreparable miscarriage of justice." *Laker Airways*, 731 F.2d at 927. Although it considers factors like preventing duplicative litigation and inconsistent adjudications, the court has noted that "[t]hese and other factors . . . do not usually outweigh the importance of permitting foreign concurrent actions." *Id.* at 928-29. The Second Circuit, though it recognizes that interference with jurisdiction and the forum's public policies assume "greater significance," has identified three other relevant considerations: whether the foreign action is vexatious; results in delay, inconvenience, expense, inconsistency, or a race to judgment; or prejudices "other equitable considerations." App. 16a-17a.

The First Circuit subscribes to the restrictive approach, but in a limited fashion, finding that it "evinces a certain woodenness." *Quaak*, 361 F.3d at 18. Adopting a "traditional approach," it holds that a court should presume that comity considerations prohibit an anti-suit injunction, but should consider "all the facts and circumstances" to determine whether that presumption is rebutted. *Id.* at 18-19.

Thus, even among those circuits that recognize the need for deference to foreign jurisdiction in all but the narrowest of circumstances, there is significant variation regarding how narrow that set of circumstances is.

B. The Fifth, Seventh, and Ninth Circuits Have Adopted a Permissive Standard.

The Fifth, Seventh, and Ninth Circuits do not require interference with jurisdiction or important public policies, and instead hold that factors relating to the duplication of the parties and issues, such as vexatiousness of multiple litigation, inconvenience, and expense, may be sufficient to justify an anti-suit injunction. *See Kaepa*, 76 F.3d at 626-27; *Philips Med. Sys. Int'l B.V. v. Bruetman*, 8 F.3d 600, 604-05 (7th Cir. 1993); *Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League*, 652 F.2d 852, 856 (9th Cir. 1981).

The Ninth Circuit inquires whether any of four factors it considers "instructive" (whether the foreign litigation frustrates a policy of the forum, is vexatious or oppressive, threatens the forum court's jurisdiction, or prejudices other equitable considerations) is present, and, if so, examines whether an injunction's "impact on comity is tolerable." *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 990-91 (9th Cir. 2006); *see also Seattle Totems*, 652 F.2d at 856 (enjoining Canadian litigation on bases of delay, inconvenience, expense, and potentially inconsistent rulings). Similarly, the Fifth Circuit focuses primarily on whether the parallel nature of the two proceedings results in "inequitable hardship" or frustrates speedy and efficient adjudication. *See Kaepa*, 76 F.3d at 626-27. Further, the Fifth Circuit has required a showing that an anti-suit injunction "actually threatens"

relations with the country where litigation is enjoined before comity considerations override the determination that the parallel litigation is vexatious. *Id.* at 627.

The Seventh Circuit "incline[s] toward the laxer standard" applied by the Fifth and Ninth Circuits, under which an anti-suit injunction can issue based on "nothing more than a duplication of the parties and the issues." *Bruetman*, 8 F.3d at 605-06. Like the Fifth Circuit, the Seventh Circuit presumes that the injunction will *not* impair international comity unless the opposing party offers "some indication that the issuance of an injunction really would throw a monkey wrench, however small, into the foreign relations of the United States." *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425, 431 (7th Cir. 1993).

C. Under a Proper Application of a Restrictive Standard, the Anti-Suit Injunction in This Case Cannot Stand.

Applying the standard articulated by the Sixth, Eighth and Third Circuits, the district court's anti-suit injunction against Pertamina should be reversed. The Second Circuit incorrectly found that the threat-to-jurisdiction, public policy, and "vexatiousness" factors supported the anti-suit injunction in this case, and, in so doing, took a more expansive view of those factors than earlier Second Circuit decisions and other circuits have.

The Second Circuit reasoned that Pertamina's Cayman action for fraud interfered with the federal

courts' jurisdiction because it sought to recover the same funds that the district court had ordered turned over to KBC. On the contrary, once the funds were turned over, the district court's jurisdiction had been fully satisfied and the district court's enforcement process had concluded.

Courts typically have found interference with jurisdiction of a level supporting an anti-suit injunction when the foreign court threatened to prevent the domestic court from rendering judgment or to carve out exclusive jurisdiction. *See, e.g.*, *Quaak*, 361 F.3d at 20 (foreign action sought to "thwart[] the very discovery that the district court . . . deemed essential"); *China Trade*, 837 F.2d at 36-37 (anti-suit injunction may be appropriate to protect jurisdiction when foreign court is "attempting to carve out exclusive jurisdiction over the action," such as by "attempt[ing] to enjoin the [U.S.] proceedings" or seeking "to prevent the [district court] from exercising its jurisdiction over th[e] case"). In contrast, requesting relief from a foreign court, even where the same relief was not sought or was denied in the domestic court, is not a jurisdictional threat. *See Sea Containers Ltd. v. Stena AB*, 890 F.2d 1205, 1214 (D.C. Cir. 1989) (litigant's ability to repair to a foreign court with a lower standard "does not represent an evasion of forum law and policy that justifies injunctive relief") (internal quotation marks omitted); *Gau Shan*, 956 F.2d at 1356 ("The possibility that a holding of a Hong Kong court might permit Bankers Trust to gain control of Gau Shan is not a threat to the jurisdiction of the United States courts . . . ."); *see also Goss*, 491 F.3d at 367 ("Although [the foreign suit] understandably is

objectionable to Goss, it does not threaten United States jurisdiction . . . .").

The Second Circuit further found that the Cayman action impairs the strong public policy in favor of international arbitration. Quite the contrary, as discussed above, it is the anti-suit injunction in this case that undermines the New York Convention's international arbitration regime. When acting as courts of secondary jurisdiction, with limited enforcement functions under the Convention, U.S. courts should be particularly hesitant to restrain foreign litigation to "protect" their judgments. *See Karaha Bodas*, 335 F.3d at 370. And, if the Cayman lawsuit truly were improper relitigation of the arbitration, the Cayman court would be perfectly capable of so deciding, based on applicable res judicata principles.

In addition to its erroneous application of the threat-to-jurisdiction and public policy factors, the Second Circuit also relied on a third factor – "vexatiousness" – in affirming the anti-suit injunction. Had it applied the more restrictive standard of the Sixth, Eighth and Third Circuits – which does not recognize "vexatiousness" as a ground for an anti-suit injunction – it might well have reached a different result. In any event, Pertamina's Cayman Action was not vexatious. Pertamina sought to raise its fraud allegations in appropriate fora soon after learning of them, pp. 8-9, *supra*. And while the Second Circuit suggested that Pertamina should have raised its fraud claim in the United States, instead of the Cayman Islands, *see* App. 33a-34a, there was no requirement that Pertamina do so,

and there is nothing vexatious about suing a litigant in its home jurisdiction.

D. The Circuit Split Generates Unpredictability in International Commerce and Increases the Likelihood that Foreign Courts Will Enjoin U.S. Litigation.

Over twenty years ago, the D.C. Circuit observed that "[t]here are no precise rules governing the appropriateness of antisuit injunctions." *Laker Airways*, 731 F.2d at 927. Today, that remains true and, beyond the lack of "precise rules," persistent disagreement about the standard pervades the case law on anti-suit injunctions.

The circuit split has genuine consequences for international commerce and relations. First, it injects unpredictability into international commerce, which "depends in no small part on the ability of merchants to predict the likely consequences of their conduct in overseas markets." *Gau Shan*, 956 F.2d at 1355. A foreign entity doing business in the United States, and subjecting itself to *in personam* jurisdiction, has little ability to predict whether it might be enjoined from litigation in its own country, or elsewhere, on the basis of a parallel U.S. suit.

Second, the lack of a uniform policy that duly regards comity likely increases the willingness of other sovereigns to enjoin litigants from prosecuting U.S. actions, absent any assurance that our courts would exercise their injunctive authority sparingly. This, in turn, increases the likelihood that both the foreign court and the United States court will issue

injunctions, such that an "undesirable stalemate" in which both actions are paralyzed will occur, *Gau Shan*, 956 F.2d 1355, or that one court will disregard the injunction of the other. *Cf. Dependable Hwy. Express, Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1067-69 (9th Cir. 2007) (refusing to stay a litigation that was enjoined pursuant to an English court's anti-suit injunction). The absence of clear guidance at a national level therefore debilitates cooperation and reciprocity with foreign courts exercising concurrent jurisdiction.

This Court should resolve this enduring conflict by articulating a single standard for anti-suit injunctions, one that gives due regard to the fundamental principle of comity to non-U.S. tribunals. In addition to eliminating circuit-dependent disparity in outcomes, such a standard will promote predictability and stability in international commercial transactions and will encourage foreign jurisdictions to exercise similar restraint in considering whether to enjoin U.S. litigation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID E. KENDALL
CRAIG D. SINGER
Counsel of Record

THOMAS J. ROBERTS
KATHERINE M. TURNER
JOHN S. WILLIAMS
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000

HENRY WEISBURG
SHEARMAN & STERLING LLP
599 Lexington Avenue
New York, NY 10022
(212) 848-4000

Attorneys for Petitioner

NOVEMBER 2007

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

KARAHA BODAS COMPANY, L.L.C., *Petitioner-Appellee*,

v.

PERUSAHAAN PERTAMBANGAN DAN GAS BUMI NEGARA, *Respondent-Appellant*,

MINISTRY OF FINANCE OF THE REPUBLIC OF INDONESIA, *Interested-Party*.

Docket No. 07-0065-cv

Argued: May 21, 2007
Decided: Sept. 7, 2007

Craig D. Singer Williams & Connolly LLP, Washington, DC, (Henry Weisburg, Shearman & Sterling LLP, New York, NY; David E. Kendall, Thomas J. Roberts, Katherine M. Turner, and John S. Williams, Williams & Connolly LLP, Washington, DC, on the brief), for Respondent-Appellant.

Christopher S. Dugan (James E. Berger, Danielle W. Pierce, and Kaycee Sullivan, on the brief), Paul, Hastings, Janofsky & Walker LLP, New York, NY, for Petitioner-Appellee.

Before: WALKER and CABRANES, Circuit Judges, and BERMAN,* District Judge.

JOSÉ A. CABRANES, Circuit Judge:

This case requires us to consider the circumstances under which a federal court may enjoin foreign judicial proceedings that threaten to undermine federal judgments confirming and enforcing a foreign arbitral award. The United States District Court for the Southern District of New York (Thomas P. Griesa, *Judge*) enjoined appellant Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina") from pursuing foreign litigation that would undermine federal judgments enforcing a foreign arbitral award that appellee Karaha Bodas Company, L.L.C. ("KBC") had obtained in Switzerland and enforced in the United States pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 ("New York Convention" or "Convention"), *implemented at* 9 U.S.C. §§ 201-208. *See Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* 465 F.Supp.2d 283 (S.D.N.Y.2006) ("*District Court Opinion*"). The District Court issued the anti-foreign-suit injunction upon learning that Pertamina had initiated a suit in the Cayman Islands that sought, *inter alia,* to "vitiate" the foreign arbitral award and obtain return of funds that had been paid

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* The Honorable Richard M. Berman, United States District Judge for the Southern District of New York, sitting by designation.

over pursuant to the award.

Pertamina argues on appeal that the District Court used the wrong legal standard to determine whether an anti-foreign-suit injunction should issue against it and that, under the proper legal standard, the injunction should not have been granted. Pertamina also argues that, in any event, the District Court lacked jurisdiction to maintain the injunction once the federal money judgment against it was satisfied.

Although we find that the District Court did not apply the correct legal standard, we affirm its judgment with minor modifications. We conclude that: (1) the test set forth in *China Trade & Development Corp. v. M.V. Choong Yong*, 837 F.2d 33 (2d Cir.1987), applies to the anti-suit injunction; (2) the injunction was justified under the *China Trade* test; and (3) the District Court maintains jurisdiction to protect the federal judgments even after the money judgment against appellant was satisfied. We also modify the scope of the injunction to clarify that the injunction does not prohibit foreign confirmation proceedings contemplated by the New York Convention.

The dispute between the parties has been litigated extensively in several countries and two federal circuits for almost ten years. We set forth only those facts relevant to the disposition of the appeal.

A. The Project and Arbitration Award

In 1994, KBC, a Cayman Islands limited liability company owned by American power companies and other investors, and Pertamina, an oil and gas company owned and controlled by the Republic of Indonesia, entered into a joint venture for a project to explore and develop certain geothermal energy resources in Indonesia (the "Project"). *See District Court Opinion,* 465 F.Supp.2d at 284. The parties agreed to settle any disputes between them by binding arbitration in Geneva, Switzerland, under the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL"). The parties further agreed that their contractual relationship would be governed by Indonesian law.

By 1998, the Indonesian government had suspended the Project. In 1998, KBC initiated arbitration proceedings in Switzerland in which it contended that the Indonesian government's actions caused it over $600 million in damages and lost profits. During the arbitration, the parties contested the potential yield of the geothermal resources KBC had contracted to develop with Pertamina and the validity of KBC's projections concerning the facilities it could develop to tap those resources. Pertamina contended that the geothermal resource and development estimates put forward by KBC when entering into the Project were "sham[s]," and that KBC had "no *bona fide* intention" to develop the energy-generating facilities proposed in its documents. The Swiss arbitral tribunal rejected Pertamina's allegations "about the genuineness" of

the information provided by KBC in support of its claims, but acknowledged the possibility that KBC's projections may have been "overestimate[s]." On December 18, 2000, the arbitral panel issued a final decision (the "Award") awarding KBC more than $261 million in damages, lost profits, and costs of arbitration, plus 4% interest per annum from January 1, 2001, until the date of full payment. In February 2001, Pertamina filed a petition challenging the Award in the Supreme Court of Switzerland. This challenge was dismissed in April 2001 because Pertamina failed to pay court fees on a timely basis. *District Court Opinion,* 465 F.Supp.2d at 284-85. The dismissal became final in August 2001 when the Supreme Court of Switzerland denied Pertamina's request for reconsideration.

B. Fifth Circuit Litigation

In early 2001, KBC initiated proceedings in the United States District Court for the Southern District of Texas ("Texas District Court") to confirm the Award pursuant to the New York Convention. The Texas District Court entered a judgment in December 2001 confirming the Award in the amount of $261 million plus interest. *See Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* 190 F.Supp.2d 936 (S.D.Tex.2001) ("*Texas Confirmation Opinion*").

While the Texas District Court judgment confirming the Award was on appeal to the Fifth Circuit, Pertamina filed an action in a Jakarta, Indonesia, trial court in March 2002 seeking to collaterally attack the Award and enjoin KBC from

enforcing the Award. KBC obtained a temporary restraining order from the Texas District Court prohibiting Pertamina from pursuing injunctive relief against KBC in Indonesia while the Texas District Court considered whether the Indonesian action impinged on its judgment and "upon KBC's legitimate efforts to enforce [KBC's] rights thereunder." *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Nebara,* 264 F.Supp.2d 470, 474 (S.D.Tex.2002) ("*Texas Injunction Opinion*"),*rev'd,*335 F.3d 357 (5th Cir.2003) ("*Fifth Circuit Injunction Opinion*"). Despite the Texas District Court's temporary restraining order, Pertamina obtained an injunction from the Indonesian trial court prohibiting KBC from enforcing the Award and imposing on KBC "the obligation to pay enforcement money in the amount of US$500,000.00 for each day this order is contravened, which amount must be paid promptly and fully to ... Pertamina." *Texas Injunction Opinion,* 264 F.Supp.2d at 474 n. 3 (quoting Indonesian injunction). The Indonesian trial court also issued an order annulling the Award. *See Fifth Circuit Injunction Opinion,* 335 F.3d at 363. Following entry of the Indonesian injunction, the Texas District Court issued a preliminary injunction prohibiting Pertamina from enforcing the Indonesian injunction or collecting penalties that might be imposed on KBC under the Indonesian injunction. *See Texas Injunction Opinion,* 264 F.Supp.2d at 483.

While the Indonesian trial court's decision was on appeal to the Indonesian Supreme Court, the Fifth Circuit vacated the preliminary anti-suit injunction issued by the Texas District Court. *See Fifth Circuit*

Injunction Opinion, 335 F.3d at 360. In its decision, the Fifth Circuit determined that, "as the Convention already provides for multiple simultaneous proceedings, it is difficult to envision how court proceedings in Indonesia could amount to an inequitable hardship" sufficient to support an anti-suit injunction against the Indonesian proceedings. *Id.* at 368. The Fifth Circuit concluded that, in any event, as a court of secondary jurisdiction under the New York Convention,[1] charged only with enforcing

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[1] Under the New York Convention, " 'the country in which, or under the [arbitration] law of which, [an] award was made' is said to have *primary* jurisdiction over the arbitration award. All other signatory States are *secondary* jurisdictions, in which parties can only contest whether that State should enforce the arbitral award." *Fifth Circuit Injunction Opinion*, 335 F.3d at 364 (quoting New York Convention art. V(1)(e)). As explained by the Fifth Circuit, the Convention assigns different roles to national courts to carry out the aims of the treaty. Articles IV and V of the Convention specify the procedures for courts of secondary jurisdictions to follow when deciding whether to enforce a foreign arbitral award. Article IV provides that a party can obtain enforcement of its award by furnishing to the putative enforcement court the authenticated award and the original arbitration agreement (or a certified copy of both). Article V, in turn, enumerates specific grounds on which the court *may* refuse enforcement if the party contesting enforcement provides proof sufficient to meet one of the bases for refusal.

In contrast to the limited authority of secondary-jurisdiction courts to review the arbitral award, courts of primary jurisdiction, usually the courts of the country of the arbitral situs, have much broader discretion to set aside an award. By its silence on the matter, the Convention does not restrict the grounds on which primary-jurisdiction courts may annul an award, thereby leaving to a primary jurisdiction's local law the decision whether to set aside an award. Consequently, even though courts of a *primary* jurisdiction may apply their own domestic law when evaluating an attempt to annul or set aside

or refusing to enforce a foreign arbitral award, it is not the district court's burden or ours to protect KBC from all the legal hardships it might undergo in a foreign country as a result of this foreign arbitration or the international commercial dispute that spawned it. *Id.* at 369.

In March 2004, the Indonesian Supreme Court vacated the Indonesian trial court's order annulling the Award and issuing the anti-suit injunction. In the ruling, the Indonesian Supreme Court concluded that only a Swiss court had power to annul the Award. Later that month, the Fifth Circuit affirmed the Texas District Court's confirmation of the Award. *See Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* 364 F.3d 274, 282 (5th Cir.) ("*Fifth Circuit Confirmation Opinion*"), *cert. denied,* 543 U.S. 917-18, 125 S.Ct. 59, 160 L.Ed.2d 202 (2004).[2] In doing so, the Fifth Circuit concluded (as had the Supreme Court of Indonesia,

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an arbitral award, courts in countries of *secondary* jurisdiction may refuse enforcement only on the limited grounds specified in Article V. *Id.* at 368 (footnotes omitted).

[2] The appeal was not heard until after Judge Griesa had considered and rejected Pertamina's post-judgment motion for relief from judgment pursuant to Fed.R.Civ.P. 60(b)(2) (providing for relief from judgment on the basis of "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial") and Fed.R.Civ.P. 60(b)(5) (providing for relief from judgment if, *inter alia,* "a prior judgment on which it is based has been reversed or otherwise vacated"). Pertamina argued that newly-discovered evidence that some of KBC's investors had received payments pursuant to a political risk insurance policy supported relief under Rule 60(b)(2), and that the Indonesian trial court's order annulling the award supported relief under Rule 60(b)(5). *See Fifth Circuit Confirmation Opinion,* 364 F.3d at 286.

unbeknownst to the Fifth Circuit) that, because only a Swiss court could annul the award under the New York Convention, the Indonesian annulment order did not require vacating the judgment confirming the Award in the United States. *See Id.* at 308-10.

C. Other Confirmation and Enforcement Proceedings

Pursuant to the New York Convention, KBC also sought to confirm and enforce the Award against Pertamina in Hong Kong, Singapore, and Canada. Those efforts yielded approximately $900,000 to be applied to the amount owed by Pertamina under the Award. *See District Court Opinion,* 465 F.Supp.2d at 286.[3]

D. Second Circuit Litigation

1. Enforcement Proceedings

When Pertamina appealed the Texas District Court's judgment to the Fifth Circuit, it declined to post a supersedeas bond in order to obtain a stay of judgment pending appeal. *See* Fed.R.Civ.P. 62(d) ("When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay...."). This permitted KBC to seek registration and enforcement of the Texas District Court's judgment in the Southern District of New York, where Pertamina

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[3] KBC confirmed its award in Hong Kong and Canada but obtained funds from Pertamina only in Hong Kong. *Id.* KBC voluntarily dismissed its action in Singapore. *Id.*

maintained several bank accounts in its name that held hundreds of millions of dollars in assets. *See* 28 U.S.C. § 1963 (providing for registration of federal judgments in other districts);[4] *District Court Opinion*, 465 F.Supp.2d at 286, 291. KBC registered the Texas judgment confirming the Award with the District Court on February 22, 2002, and immediately commenced execution proceedings against Pertamina. *See Id.* at 286.

The parties then engaged in heated litigation concerning ownership of the assets in the New York bank accounts held in Pertamina's name. Pertamina contended that the Indonesian government was the actual owner of the funds in the New York bank accounts. On an interlocutory appeal certified pursuant to 28 U.S.C. § 1292(b), we determined that

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[4] 28 U.S.C. § 1963 states, in relevant part:

> A judgment in an action for the recovery of money or property entered in any court of appeals, district court, bankruptcy court, or in the Court of International Trade may be registered by filing a certified copy of the judgment in any other district ... when the judgment has become final by appeal or expiration of the time for appeal or when ordered by the court that entered the judgment for good cause shown.... A judgment so registered shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner.

The procedure prescribed under this section is in addition to other procedures provided by law for the enforcement of judgments.

both Pertamina and the Indonesian government owned some part of the funds in the accounts; and that KBC was entitled to satisfy its judgment against Pertamina out of the portion of the funds owned by Pertamina. *See Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* 313 F.3d 70, 75, 92-93 (2d Cir.2002), *cert. denied,*539 U.S. 904, 123 S.Ct. 2256, 156 L.Ed.2d 113 (2003). The District Court ultimately ordered Pertamina to turn over to KBC the entire amount of the Award (by this time valued at roughly $319 million, including interest on the award)-less the $900,000 already recovered by KBC in Hong Kong-out of the Pertamina-owned funds in the New York bank accounts. *See District Court Decision,* 465 F.Supp.2d at 291. We affirmed this order in March 2006. *See Karaha Bodas Co. v. Ministry of Finance of the Republic of Indonesia,* Nos. 04-6551-cv, 04-6672-cv, 2006 WL 565694, at *2 (2d Cir. Mar.9, 2006). Pertamina, seeking review of our decision, petitioned the United States Supreme Court for a writ of certiorari.

2. The Anti-Suit Injunction

While Pertamina's petition for a writ of certiorari was pending before the Supreme Court, the District Court asked Pertamina whether, if the Supreme Court denied certiorari, Pertamina would finally consent to pay the remainder of the judgment against it, thus ending the litigation between the parties. *See District Court Opinion,* 465 F.Supp.2d at 288. In a letter to the District Court dated August 28, 2006, Pertamina stated that if certiorari were denied, it would "not object before this Court to the payment

of the judgment." *Id.* This statement was technically accurate. The Supreme Court denied certiorari on October 2, 2006, see --- U.S. ----, 127 S.Ct. 129, 166 L.Ed.2d 35 (2006), and on October 10, 2006, almost all of the remainder of the $319 million payment was turned over to KBC.[5] In the meanwhile, however, Pertamina filed a new action in the Cayman Islands (the "Cayman Islands action").

The Cayman Islands action, filed on September 15, 2006, was based on the theory that the Award was procured by fraud. Pertamina sought damages in the amount of the Award against KBC along with a variety of ancillary remedies. *See District Court Opinion,* 465 F.Supp.2d at 288-89. Specifically, Pertamina alleged in a supporting affidavit that, in August 2005, Pertamina's "advisors" discovered documents that "KBC had left behind when it ceased its operations and left Indonesia some time around 2002," which "revealed that KBC had committed a fraud on Pertamina" by creating fraudulent resource and development estimates for the Project. Pertamina further alleged that the fraud associated with these estimates was "such as to vitiate the Arbitral Award." *District Court Opinion,* 465 F.Supp.2d at 289 (internal quotation marks omitted). Accordingly, Pertamina sought damages, an accounting, and restitution from KBC for the alleged fraud, including "[r]estitution and/or equitable compensation and/or repayment of ... all sums

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[5] "A small portion of the funds were not turned over until November 29, 2006, when the final turnover calculation was made." Appellee's Br. 13 n. 7.

received by [KBC] pursuant to the Arbitral Award (and its enforcement)." *See id*[6]. Pertamina also sought a "*Mareva* injunction"[7] prohibiting KBC from disposing of any funds obtained pursuant to the Award, including "any sums received or to be received by [KBC] pursuant to any order of the United States District Court for the Southern District of New York ... pursuant to proceedings ... directed to enforcing the [Award] in favour of [KBC]." *See District Court Opinion,* 465 F.Supp.2d at 289-90.

In response to the Cayman Islands action, KBC moved in the Southern District of New York for an injunction prohibiting Pertamina from (1) maintaining the Cayman Islands action, or any similar action anywhere, and (2) restraining KBC from disposing of funds obtained from Pertamina. The District Court granted KBC's application for an anti-suit injunction. It found that the Cayman

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[6] These allegations and claims were renewed in an Amended Writ of Summons filed on October 6, 2006, after the United States Supreme Court had denied Pertamina's petition for a writ of certiorari.

[7] Injunctions that prohibit a party from transferring assets pending resolution of an action in order to "ensure the effectiveness of an ultimate remedy ... [are] known as '*Mareva* injunctions' for the second English case to issue one, *see Mareva Compania Naviera S.A. v. Int'l Bulkcarriers S.A.*, (1975) 2 Lloyd's Rep. 509." *SEC v. Cavanagh,* 445 F.3d 105, 117 & n. 27 (2d Cir.2006). Though these injunctions are "available in equity in England and Canada, among other places," *Id.* at n. 27, federal courts lack power to issue them. *See Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 328-29, 119 S.Ct. 1961, 144 L.Ed.2d 319 (1999); *Cavanagh*, 445 F.3d at 117-18.

Islands action was intended to undo the Award and, furthermore, "ha[d] the obvious purpose of nullifying the judgment[s] of the federal court in Texas ... [and] the Southern District of New York." *District Court Opinion,* 465 F.Supp.2d at 292-93. After noting that it "ha[d] the power, and indeed the duty, to deal with abusive litigation tactics used by a party before it," the District Court concluded that Pertamina had engaged in abusive litigation tactics by deciding to file suit in the Cayman Islands rather than seek relief using means available to it under federal law.[8] *See Id.* at 300. Accordingly, the District Court (1) made the injunction permanent and (2) issued a declaratory judgment "declaring that the funds recovered by KBC pursuant to the judgments in this matter are the property of KBC, that KBC has full right to dispose of such funds as KBC sees fit, and that, in the event that Pertamina should for some reason obtain an order of the Cayman Islands court or any other court, based upon matters relating to the Arbitral Award, purporting to interfere with KBC's rights to dispose of the funds, KBC has no obligation to comply with such order." *Id.* at 301.

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[8] The District Court noted that Pertamina could have sought relief from the federal judgments confirming and enforcing the award in federal court through Fed.R.Civ.P. 60(b)(3), which permits a motion seeking relief from judgment to be brought (1) on the basis of "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party," or (2) through "an independent action" alleging fraud. *See* 465 F.Supp.2d at 293-94; *see also* Fed.R.Civ.P. 60(b) (noting that courts may "entertain an independent action to relieve a party from a judgment, order, or proceeding, ... or to set aside a judgment for fraud upon the court").

Finally, pending appeal, it stayed its decision authorizing KBC to dispose of funds obtained pursuant to its earlier judgments.

3. Subsequent Developments

While Pertamina's appeal from the District Court's anti-suit injunction was being briefed, KBC moved us to lift the stay entered by the District Court, thereby authorizing it to distribute to its shareholders the $263 million it had obtained from Pertamina. We granted KBC's motion on February 13, 2007. On February 15, 2007, Pertamina's motion for an emergency stay before the United States Supreme Court was denied. At oral argument for the instant appeal, we were informed by KBC that, following the lifting of the stay, KBC distributed substantially all of the remaining Pertamina funds to its shareholders and was thus no longer in possession of any of the assets that would be the subject of the *Mareva* injunction sought by Pertamina in the Cayman Islands.[9] Following oral argument, we ordered the parties to submit supplemental letter briefs addressing whether the satisfaction of the money judgment against Pertamina affected the District Court's jurisdiction to maintain the

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[9] On April 30, 2007, KBC obtained an order sanctioning Pertamina for bad-faith litigation conduct. The District Court found that a Pertamina witness had lied in a deposition in an effort to frustrate the District Court from accurately ruling on the ownership of funds in New York bank accounts. *See Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, No. 21-98, 2007 WL 1284903 at *6 (S.D.N.Y. Apr. 30, 2007).

injunction.

A. Standard of Review

The standard of review for the grant of a permanent injunction, including an anti-suit injunction, is abuse of discretion. *Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Tech., Inc.*, 369 F.3d 645, 651 (2d Cir.2004); *China Trade*, 837 F.2d at 37. We will find such an abuse of discretion if the district court "applies legal standards incorrectly or relies upon clearly erroneous findings of fact, or proceed[s] on the basis of an erroneous view of the applicable law." *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 398 (2d Cir.2004) (citation omitted); *see also Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 169 (2d Cir.2001) ("error of law" constitutes "abuse of discretion").

B. The *China Trade* Test Applies to, and Supports Entry of, the Anti-Suit Injunction

1. The *China Trade* Test

In *China Trade*, we adopted a test governing the circumstances under which a federal district court could issue an anti-foreign-suit injunction. Under the *China Trade* test, an anti-suit injunction against foreign litigation may be imposed only if two threshold requirements are met: "(A) the parties are the same in both matters, and (B) resolution of the case before the enjoining court is dispositive of the action to be enjoined." *Paramedics*, 369 F.3d at 652 (citing *China Trade*, 837 F.2d at 35). If these two threshold requirements are satisfied, "courts are

directed to consider a number of additional factors," *Id.*, including whether the parallel litigation would:

> (1) frustrat[e] ... a policy in the enjoining forum; (2) ... be vexatious; (3) ... threat[en] ... the issuing court's in rem or quasi in rem jurisdiction; (4) ... prejudice other equitable considerations; or (5) ... result in delay, inconvenience, expense, inconsistency, or a race to judgment.

Ibeto Petrochemical Industries Ltd. v. M/T Beffen, 475 F.3d 56, 64 (2d Cir.2007) (quoting *China Trade*, 837 F.2d at 35). *China Trade* instructed that two of these factors should be accorded "greater significance": whether the foreign action threatens the enjoining forum's jurisdiction or its "strong public policies." 837 F.2d at 36. However, we have reiterated that *all* of the additional factors should be considered when determining whether an anti-suit injunction is warranted. *See Ibeto Petrochemical*, 475 F.3d at 64 (disagreeing with courts and commentators that "have erroneously interpreted *China Trade* to say that we consider *only* these two [more significant] factors"). *China Trade* also states that "principles of comity counsel that injunctions restraining foreign litigation be 'used sparingly' and 'granted only with care and great restraint.' "*Paramedics*, 369 F.3d at 652 (quoting *China Trade*, 837 F.2d at 36).

2. The *China Trade* Test Applies to the Anti-Suit Injunction

China Trade involved an anti-suit injunction prohibiting a foreign defendant from pursuing a parallel proceeding in a foreign forum *while a proceeding was pending* in the Southern District of New York. The District Court, noting that judgment had already been entered in American courts, did not apply the *China Trade* test. Relying on *dicta* in a district court decision that had been affirmed by our Court in a brief published *per curiam* opinion, the District Court concluded that a "more lenient standard" applied to injunctions intended to prevent an abusive effort to evade a domestic judgment. *See District Court Opinion,* 465 F.Supp.2d at 294-95 (quoting *Farrell Lines Inc. v. Columbus Cello-Poly Corp.,* 32 F.Supp.2d 118, 131 (S.D.N.Y.1997), *aff'd sub nom, Farrell Lines Inc. v. Ceres Terminals Inc.,* 161 F.3d 115 (2d Cir.1998)).[10]

In the instant case, Pertamina argues that the District Court committed legal error in concluding that KBC did not have to satisfy the *China Trade*

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[10] In *Farrell Lines,* the district court held that the plaintiff *had* satisfied the "strict" *China Trade* standard before proceeding to note that a "more lenient" standard *should* apply where the domestic forum had already decided the merits of the claim being relitigated in a foreign forum. *See Farrell Lines,* 32 F.Supp.2d at 130-31. *Farrell Lines* derived the "more lenient standard" from the District of Columbia Circuit's decision in *Laker Airways Ltd. v. Sabena, Belgian World Airlines,* 731 F.2d 909 (D.C.Cir.1984), which stated that when "the [anti-foreign-suit] injunction is requested after a previous judgment on the merits, ... a court may freely protect the integrity of its judgments by preventing their evasion through vexatious or oppressive relitigation." *Id.* at 928; *see Farrell Lines,* 32 F.Supp.2d at 131.

test in order to obtain an anti-suit injunction against it. It notes that the *China Trade* test has been applied by our Court for twenty years, and that we applied the *China Trade* test to an anti-foreign-suit injunction in *Paramedics* even though a "judgment ha[d] been rendered" in that case. 369 F.3d at 651, 653-54.

We agree with Pertamina that, pursuant to our decision in *Paramedics,* the *China Trade* test applies to anti-foreign-suit injunctions intended to protect federal judgments. We note, however, that as discussed in *Paramedics,* the discretionary *China Trade* factors will tend to weigh in favor of an anti-foreign-suit injunction that is sought to protect a federal judgment. In *Paramedics,* we applied the *China Trade* test to an anti-foreign-suit injunction that was entered to protect a federal judgment compelling arbitration. *See* 369 F.3d at 653-54. In doing so, we explained that " '[t]here is less justification for permitting a second action,' as here, 'after a prior court has reached a judgment on the same issues,' " *Id.* at 654 (quoting *Laker Airways,* 731 F.2d at 928 n. 53), and that "[a]n anti-suit injunction may be needed to protect the court's jurisdiction once a judgment has been rendered," *Id.* We also concluded that while "[p]rinciples of comity weigh heavily in the decision to impose a foreign anti-suit injunction .... where one court has already reached a judgment-on the same issues, involving the same parties-considerations of comity have diminished force." *Id.* at 654-55.

3. The *China Trade* Test Is Satisfied

Despite the District Court's legal error in not applying the *China Trade* test, we do not think it necessary to vacate the injunction and remand for further proceedings given the particular circumstances of the instant case. The principal difference between the "more lenient" test applied by the District Court and the *China Trade* test lies in the threshold requirements that a party must surmount to obtain an injunction under the latter. Based on the extensive record developed in the District Court and in other United States and foreign courts, we conclude as a matter of law that those threshold requirements are met. Turning to the discretionary factors under *China Trade,* we find that the District Court properly considered these factors, albeit under a different rubric, and found them supportive of injunctive relief.[11]

a. The Threshold Requirements Are Met

It is undisputed that the first threshold requirement of *China Trade* is satisfied; the parties are the same in both the proceedings before the District Court and in the Cayman Islands action. Application of the second threshold requirement of *China Trade*-that resolution of the case before the enjoining court is dispositive of the action to be enjoined, *see* 837 F.2d at 35-requires further analysis. First, we must determine the substance of the "case before the enjoining court." KBC obtained

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[11] We further note that the scope and duration of this litigation militate heavily in favor of a swift and definitive resolution of the dispute over the injunction.

(1) a judgment from the Texas District Court confirming the Award and (2) judgments from the Southern District of New York enforcing the Texas District Court's judgment (collectively, the "federal judgments"). Pertamina asserts that the only "case before the enjoining court"-that is, the Southern District of New York-was the determination of whether certain funds located in New York could be used to satisfy a judgment against it. According to Pertamina, the proceedings before the Southern District of New York thus could not have been dispositive of the Cayman Islands action because the enforcement proceeding that took place there "in no way implicated-let alone was dispositive of-Pertamina's lawsuit for fraud in the Cayman Islands." Pertamina argues further that the Southern District of New York inappropriately "arrogated to itself the role of defending the judgment of the Southern District of Texas confirming the arbitration award."

This argument is without merit. When KBC registered the Texas District Court's judgment confirming the arbitration award in the Southern District of New York, that judgment had the same effect, and was entitled to the same protection, as if it had been entered in the Southern District of New York in the first instance. *See* 28 U.S.C. § 1963 (stating that a registered judgment "shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner"). The Southern District of New York was therefore empowered to take any action to protect the judgment confirming the Award that the Texas District Court could have taken. KBC did not need to

return to Texas in order to protect and enforce the judgment. *See Smith v. Woosley*, 399 F.3d 428, 431-36 (2d Cir.2005) (affirming anti-suit injunction issued by Connecticut federal court to protect judgment rendered by Pennsylvania federal court); *Covington Indus., Inc. v. Resintex A. G.*, 629 F.2d 730, 732 n. 2 (2d Cir.1980) (discussing power of court of registration to determine validity of judgment rendered in another federal district). Thus, we conclude that the "case before the enjoining court" includes all of the federal judgments related to the case, including (1) the Texas District Court judgment confirming the Award and (2) the judgments entered by the Southern District of New York enforcing the Texas District Court's judgment.

We also must examine whether the federal judgments that the Southern District of New York sought to protect were "dispositive" of the Cayman Islands action. We agree with KBC that the federal judgments satisfy the *China Trade* requirement because the Award, and the federal judgments confirming and enforcing it, actually decided the claims raised in the Cayman Islands action. We also conclude that the New York Convention permits the federal judgments to be treated as "dispositive" of the Cayman Islands action.

As discussed above, the Texas District Court confirmed, and the District Court enforced, an Award that was entered in a Swiss arbitration proceeding. These courts confirmed and enforced the Award against Pertamina even though, as discussed above, Pertamina had argued in the Swiss arbitration that the resource and development estimates prepared by

KBC were fraudulent-the same allegation, though assertedly with new factual support, that Pertamina makes in the Cayman Islands action. Moreover, the Fifth Circuit, in affirming the Texas District Court's confirmation of the arbitration award, rejected Pertamina's argument that enforcement of the Award should be refused because it was procured by fraud. *See Fifth Circuit Confirmation Opinion,* 364 F.3d at 306-07 (noting that "[e]nforcement of an arbitration award may be refused ... if the award was procured by fraud" and rejecting arguments that enforcement of the award against Pertamina should be refused on this basis).

Pertamina argues that the Cayman Islands action is a proceeding "separate and independent of the arbitration proceedings and award." We, however, conclude that this characterization is inconsistent with the nature of the Cayman Islands action. Beyond seeking to vitiate the Award, the Cayman Islands action seeks a(1) determination that the District Court wrongfully ordered almost $319 million to be paid to KBC pursuant to the federal judgments confirming and enforcing the Award, and (2) return of all funds obtained by KBC "pursuant to the Arbitral Award (and its enforcement)."[12]

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[12] We also note that, were the action brought in federal court, it would not have been characterized as an "independent" action. Because the action, if successful, would have the effect of vitiating the federal judgments, the action would have been treated as "ancillary" to the earlier federal proceedings-in essence, as "a continuation of the former suit" in federal court-even if it was formally denominated as an "independent action" for fraud. *United States v. Beggerly,* 524 U.S. 38, 45-46, 118 S.Ct. 1862, 141 L.Ed.2d 32 (1998) (quoting *Pacific R.R. of Mo. v. Missouri Pacific Ry. Co.,* 111 U.S. 505, 522, 4 S.Ct. 583, 28

Although Pertamina makes new factual allegations in support of its claim that the Award should not have been enforced against it, these new factual allegations are not sufficient to undermine the preclusive effect of several earlier federal court decisions that (1) the Award should be enforced and (2) KBC is entitled to Pertamina's New York funds in an amount sufficient to satisfy the Award. *See Campaniello Imports, Ltd. v. Saporiti Italia S.p.A.*, 117 F.3d 655, 661-63 (2d Cir.1997) (holding that a district court properly dismissed, as barred by *res judicata*, an "independent action" for rescission of a prior judgment on the basis of fraud, where the plaintiff failed to mount "a viable direct attack" on the earlier judgment);[13] Restatement (Second) of Judgments § 27 (1982) ("When an issue *of fact or law* is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties ...." (emphasis

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L.Ed. 498 (1884)).

[13] *Campaniello Imports* explained that claimants seeking to vitiate an earlier judgment through an independent action "must (1) show that they have no other available or adequate remedy; (2) demonstrate that movants' own fault, neglect, or carelessness did not create the situation for which they seek equitable relief; and (3) establish a recognized ground-such as fraud, accident, or mistake-for the equitable relief." 117 F.3d at 662. Pertamina does not even attempt to satisfy the first requirement; it does not seriously dispute the District Court's conclusion that there were remedies for the alleged fraud available to it under federal law in 2002, when it obtained the documents that serve as the basis for its allegedly "new" fraud claim, or in 2005, when it finally reviewed the documents and allegedly discovered the fraud.

added)); *Id.* cmt. c ("[I]f the party against whom preclusion is sought did in fact litigate an issue of ultimate fact [*i.e.*, an issue requiring application of law to fact] and suffered an adverse determination, new evidentiary facts may not be brought forward to obtain a different determination of that ultimate fact ...."); cf. *Paramedics*, 369 F.3d at 653 (concluding, without considering the factual basis for foreign litigation, that a federal judgment compelling arbitration was dispositive of foreign litigation because the foreign litigation "concern [ed] issues that, by virtue of the district court's judgment, are reserved to arbitration").[14]

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[14] Pertamina argues that the threshold requirements of the *China Trade* test should be read as coextensive with the test applicable to federal anti-suit injunctions precluding actions in state court. A federal court has power under the Anti-Injunction Act, 28 U.S.C. § 2283, to issue an injunction "to protect ... its judgments" from further litigation in state courts under the "relitigation exception" to the broad prohibition of the Anti-Injunction Act. *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988); *see also Smith*, 399 F.3d at 431. *Choo* held that the "relitigation exception" only permits a federal court "to protect against relitigation of 'claims or issues' that 'actually have been decided by the federal court.' "*Smith*, 399 F.3d at 434 (quoting *Choo*, 486 U.S. at 148, 108 S.Ct. 1684). We noted in *Smith* that *Choo*, [b]y referring to both "claims" and "issues," ... permitted the relitigation exception to be applied to protect a federal court[ ] judgment that would be entitled to more than the issue-preclusion effect of collateral estoppel. A judgment adjudicating a claim could also be protected. But by insisting that the "claims or issues ... actually have been decided," *Choo*, 486 U.S. at 148 [108 S.Ct. 1684], the Court was not permitting protection of the full *res judicata* effect of a judgment, *i.e.*, preclusion of claims that, while not litigated, arose from the same common nucleus of operative facts as the litigated claim. *Smith*, 399 F.3d at 434 n. 8. We need not reach the question of whether the *China Trade* test

We also conclude that, under the New York Convention, the federal judgments to be protected are "dispositive" of the Cayman Islands action. Pertamina essentially argues that the federal judgments could not be dispositive because (1) the federal courts involved in confirming and enforcing the Award within the United States were only acting as "secondary-jurisdiction court[s] under the Convention," Appellant's Br. 41 (quoting *Fifth Circuit Injunction Opinion*, 335 F.3d at 372 n. 59), and (2) secondary jurisdictions, under the New York Convention, are not entitled to protect judgments related to a foreign arbitral award from foreign interference In doing so, it relies on the Fifth Circuit's earlier opinion vacating the Texas District Court's anti-suit injunction. In that decision, the Fifth Circuit noted that, because the New York Convention contemplates multiple proceedings in several nations to procure and enforce a foreign arbitral award, it was not appropriate for a secondary-jurisdiction court "to protect KBC from all the legal hardships it might undergo in a foreign country as a result of this foreign arbitration or the international commercial dispute that spawned it."

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would permit a federal court to protect the "full *res judicata* effect" of a federal judgment by enjoining claims that "while not litigated, arose from the same common nucleus of operative facts as the litigated claim," *Id.*, because the claims raised in the Cayman Islands action concerning the validity of the Award and KBC's entitlement to Pertamina's funds have *actually been* litigated in the Southern District of Texas and the Southern District of New York, even if Pertamina seeks to offer new facts in the Cayman Islands action in support of its position.

Fifth Circuit Injunction Opinion, 335 F.3d at 369.

We agree with the Fifth Circuit that federal courts should not attempt to protect a party seeking enforcement of an award under the New York Convention "from *all* the legal hardships" associated with foreign litigation over the award. But it does not follow, as Pertamina would have us hold, that a federal court cannot protect a party who is the beneficiary of a federal judgment enforcing a foreign arbitral award from *any* of the legal hardships that a party seeking to evade enforcement of that judgment might seek to impose. Federal courts in which enforcement of a foreign arbitral award is sought cannot dictate to other "secondary" jurisdictions under the New York Convention whether the award should be confirmed or enforced in those jurisdictions. *See Id.* at 372 n. 59 (noting that a federal judgment enforcing a foreign arbitral award under the New York Convention does "not automatically receive *res judicata* effect" in other jurisdictions in which enforcement is sought). But federal courts *do* have inherent power to protect *their own* judgments from being undermined or vitiated by vexatious litigation in other jurisdictions. *See Ibeto Petrochemical,* 475 F.3d at 64 (discussing whether "the foreign action would be vexatious" in affirming an antiforeign-suit injunction); *Covanta Onondaga Ltd. v. Onondaga County Res. Recovery Agency,* 318 F.3d 392, 398 (2d Cir.2003) (noting "a court's unquestioned authority to terminate and prevent the renewal of a protracted series of vexatious lawsuits filed by a litigant"). Moreover, "[e]ven in the absence of a pattern of vexatious litigation ... a district court that has adjudicated the merits of a case may have

authority to prevent relitigation." *Covanta Onondaga,* 318 F.3d at 398. As the Fifth Circuit recognized, the New York Convention does not divest federal courts of this inherent power. *See Fifth Circuit Injunction Opinion,* 335 F.3d at 365 ("Given the absence of an express provision [in the New York Convention], we discern no authority for holding that the New York Convention divests the district court of its inherent authority to issue an antisuit injunction.").

In this case, the federal judgments reached a dispositive determination that KBC should be paid $319 million of Pertamina's funds, held in New York bank accounts, pursuant to the Award. This determination is entitled to protection from Pertamina's attempts to vitiate it through the Cayman Islands action. The existence of the federal judgments ordering Pertamina to turn over $319 million is one of the factors distinguishing the injunction issued by the District Court from the injunction against the Indonesian action, which was vacated by the Fifth Circuit in 2003. In 2003, the Texas District Court had only confirmed the Award, and there had been no definitive determination that KBC was entitled to the funds that Pertamina held in the New York bank accounts. By the time that the District Court entered the anti-suit injunction at issue in this appeal, however, additional federal judgments enforcing KBC's Award had been entered. As the District Court noted, those judgments "are not conditional, or qualified, or limited in any way as to KBC's rights with respect to the monies awarded" pursuant to the Award and the federal judgment confirming it. *District Court Opinion,* 465 F.Supp.2d

at 300.

The nature of the Cayman Islands action that the District Court sought to enjoin also distinguishes the injunction at issue here from the injunction that was vacated by the Fifth Circuit. When the Fifth Circuit vacated the anti-suit injunction prohibiting litigation in Indonesia, Pertamina had an arguable-though ultimately meritless-basis for claiming that the Indonesian proceedings were permissible under the New York Convention. Under the Convention, a jurisdiction may decline to enforce a foreign arbitral award if it has "been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." New York Convention art. V(1)(e). Pertamina argued that, because Indonesian substantive law applied to the dispute between the parties, an Indonesian court had the power to set aside or suspend the Award. *See Fifth Circuit Confirmation Opinion*, 364 F.3d at 308 (noting that "Pertamina suggests that both Switzerland (the host country) and Indonesia (the country of governing law) have primary jurisdiction over the arbitration in this case" under Article V(1)(e) of the Convention); *see also* Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 Yale L.J. 1049, 1069 (1961) (asserting that Article V(1)(e) "provides that when an award is rendered in one state under the law of a second state, the courts of that second state may set aside or suspend the award").[15] In 2004, after the Texas District Court's

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[15] We disagreed with this proposition in *Yusuf Ahmed*

anti-suit injunction had been vacated, the Fifth Circuit concluded that only Switzerland had authority to set aside the Award in this case. *See Fifth Circuit Confirmation Opinion,* 364 F.3d at 308-10. But when it initiated proceedings in Indonesia in 2002, Pertamina at least had a colorable argument that Indonesian courts had a role to play in determining whether the Award should be enforced.

Here, by contrast, the Cayman Islands has no arguable basis for jurisdiction to adjudicate rights and obligations of the parties with respect to the Award. Cayman Islands courts have no power to modify or annul the Award under the Convention; and Pertamina does not even attempt to argue that the Cayman Islands action is one that would be contemplated by the Convention. We conclude that in these circumstances the District Court had power to prevent Pertamina from engaging in litigation that would tend to undermine the regime established by the Convention for recognition and enforcement of arbitral awards. "[C]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce ... agreement[s]" to submit disputes to binding international arbitration. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 629, 105

Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 21 (2d Cir.1997) (expressing approval for the proposition that "only the state under whose procedural law the arbitration was conducted has jurisdiction under Art. V(1)(e) to vacate the award").

S.Ct. 3346, 87 L.Ed.2d 444 (1985). These considerations also require us to protect the regime established by the Convention for enforcement of international arbitral awards, if necessary by enjoining parties from engaging in foreign litigation that would undermine it.[16]

b. The Additional *China Trade* Factors Support Issuance of an Injunction

As discussed above, where an anti-foreign-suit injunction is sought to protect a federal judgment, the additional *China Trade* factors will often favor issuance of an anti-suit injunction when the threshold *China Trade* requirements are met. Despite adopting a "more lenient" test, the District Court considered the discretionary factors set forth in *China Trade* and determined they warranted an injunction. *See District Court Opinion,* 465 F.Supp. at 295-301. We agree.

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[16] The Fifth Circuit expressed concern that permitting the Texas District Court's earlier injunction against Pertamina's Indonesian action to stand "could set an undesirable precedent under the Convention, permitting a secondary jurisdiction to impose penalties on a party when it disagrees with that party's attempt to challenge an award in another country." *Fifth Circuit Injunction Opinion,* 335 F.3d at 373. We agree with the Fifth Circuit that no mere disagreement with a party's approach to enforcing or attacking a foreign arbitral award under the Convention should suffice to support an anti-foreign-suit injunction. But federal courts are not obligated to sit by idly when a party engages in proceedings that undermine the regime governing enforcement of foreign arbitral awards established by the Convention.

We turn first to the two additional factors that have been described as having "greater significance," *China Trade,* 837 F.2d at 36-namely, whether the foreign action threatens the jurisdiction or the strong public policies of the enjoining forum. As in *Paramedics,* "[b]oth considerations are salient in this case." 369 F.3d at 654. *China Trade* held that "an injunction may ... be necessary to protect the enjoining court's jurisdiction." 837 F.2d at 36; *see also Paramedics,* 369 F.3d at 654 ("An anti-suit injunction may be needed to protect the court's jurisdiction once a judgment has been rendered."). Here, an injunction is necessary because the Cayman Islands action threatens to undermine the federal judgments confirming and enforcing the Award against Pertamina, and may also undermine federal jurisdiction to determine whether prior federal judgments should be invalidated on the basis of the fraud alleged by Pertamina. *Cf. Campaniello Imports,* 117 F.3d at 661 ("Res judicata 'does not preclude a litigant from making a direct attack ... upon the judgment *before the court which rendered it.*' " (emphasis added) (quoting *Weldon v. United States,* 70 F.3d 1, 5 (2d Cir.1995))). The injunction is also supported by strong public policy considerations. We have noted "the strong public policy in favor of international arbitration," and the need for proceedings under the New York Convention "to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation." *Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.,* 403 F.3d 85, 90 (2d Cir.2005) (internal quotation marks omitted). These important objectives would be undermined were we to permit Pertamina to proceed

with protracted and expensive litigation that is intended to vitiate an international arbitral award that federal courts have confirmed and enforced.

We also conclude that one of the three remaining additional *China Trade* factors-whether the foreign action would be vexatious-counsels strongly in favor of the injunction. *China Trade* noted that vexatiousness is "likely to be present whenever parallel actions are proceeding concurrently," 837 F.2d at 36. Proceedings are apt to be especially vexatious, however, where a foreign proceeding threatens to undermine a federal judgment. Here, the District Court expressly (and properly) found that "the entire point of the fraud allegations [of the Cayman Islands action] is to show that the Arbitral Award must be deemed to be vitiated- *i.e.*, to be a nullity." *District Court Opinion,* 465 F.3d at 291. In other words, the District Court concluded that the subsequent litigation in this case, being aimed at the recovery by KBC in the federal courts, was entirely vexatious. As the District Court noted:

> [A]fter almost six years of litigation in district and appellate courts based on the Arbitral Award, the American courts had finally resolved all the issues presented to them about whether the Arbitral Award should be confirmed and about the method by which KBC should recover the large amount due. Although procedures were available under federal law for Pertamina to make its claim of fraud and to seek to prevent KBC from recovering the $319 million, there was no attempt whatever by Pertamina to make use

> of such procedures.... Instead, Pertamina engaged in the six years of litigation in the United States without any mention of its claim of fraud. Finally, at the very moment when the litigation was to be legitimately ended, Pertamina brought the action in the Cayman Islands after engaging in literal subterfuge in dealing with the Court in New York. The purpose of this lawsuit is to effectively wipe out the effect of the United States judgments and to do this with as great an amount of delay as possible.

Id. at 300.[17] As indicated above, federal courts have the authority to restrain a party before it from engaging in vexatious litigation. *See, e.g., Covanta Onondaga,* 318 F.3d at 398. *China Trade* indicates that this authority should be exercised where, as here, other factors also counsel in favor of issuance of an injunction.

Finally, we note that comity considerations, though important, have "diminished force" when a court has already reached a judgment involving the same issues and parties. *Paramedics,* 369 F.3d at

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[17] We note further that the Cayman Islands action follows what, by any account, is an extraordinarily complex and protracted series of proceedings. At oral argument, KBC informed the Court (and Pertamina did not dispute) that Pertamina's resistance to confirmation and enforcement of the Award has required KBC to appear in more than fifteen courts in seven nations over the past nine years, including five appearances in our Court alone, in support of its enforcement efforts.

655. Comity concerns have particular importance under the Convention; a federal court should be wary of entering injunctions that may prevent parties from engaging in post-award enforcement or annulment proceedings that are contemplated by the Convention. But comity concerns under the Convention have no bearing on our consideration of the Cayman Islands action, which is not a proceeding contemplated by the Convention and is, moreover, intended to undermine federal judgments. As we have stated, "orders of foreign courts are not entitled to comity if the litigants who procure them have 'deliberately courted legal impediments' to the enforcement of a federal court's orders." *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 60 (2d Cir.2004) (quoting *Societe Internationale v. Rogers*, 357 U.S. 197, 208-09, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958)); *see also Id.* (noting that the District of Columbia Circuit, in *Laker Airways*, 731 F.2d at 939-40, refused to respect an English court's order where the "defendants involved in the American suit had ... gone into the English courts to generate interference with the American courts"). Accordingly, comity concerns do not weigh against entry of an anti-suit injunction in this case.

C. The District Court Maintains Jurisdiction to Enforce the Injunction

In a supplemental letter brief requested by the Court, Pertamina asserts that, regardless of whether the District Court had the authority to issue an anti-suit injunction in the first instance, it now lacks jurisdiction to maintain the injunction because Pertamina has paid the judgment against it.

Pertamina relies primarily on two Supreme Court opinions describing the boundaries of "ancillary jurisdiction," *Kokkonen v. Guardian Life Insurance Company of America,* 511 U.S. 375, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994), and *Peacock v. Thomas,* 516 U.S. 349, 116 S.Ct. 862, 133 L.Ed.2d 817 (1996), as well as the Eighth Circuit's recent decision in *Goss International Corp. v. Man Roland Druckmaschinen Aktiengesellschaft,* 491 F.3d 355 (8th Cir.2007), which vacated an anti-foreign-suit injunction imposed to protect a federal money judgment once the judgment was satisfied, *see Id.* at 369.

"[T]he doctrine of ancillary jurisdiction ... recognizes federal courts' jurisdiction over some matters (*otherwise beyond their competence*) that are incidental to other matters properly before them." *Kokkonen,* 511 U.S. at 378, 114 S.Ct. 1673 (emphasis added). The Court, in *Kokkonen,* found that jurisdiction to maintain ancillary proceedings may be exercised for two separate, though sometimes related, purposes: (1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent ... and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees, *see, e.g., Chambers v. NASCO, Inc.,* 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991) (power to compel payment of opposing party's attorney's fees as sanction for misconduct); *United States v. Hudson,* 11 U.S. (7 Cranch) 32, 34, 3 L.Ed. 259 (1812) (contempt power to maintain order during proceedings). 511 U.S. at 379-80, 114 S.Ct. 1673. It also held that a federal court did not maintain ancillary jurisdiction to hear disputes over a

settlement agreement that was not entered as an order of the court. *See Id.* at 381-82, 114 S.Ct. 1673. In *Peacock,* the Court observed that it had "approved the exercise of ancillary jurisdiction over a broad range of supplementary proceedings involving third parties to assist in the protection and enforcement of federal judgments-including attachment, mandamus, garnishment, and the prejudgment avoidance of fraudulent conveyances," *Id.* at 356, 116 S.Ct. 862, but noted that "recognition of these supplementary proceedings has not ... extended beyond attempts to execute, or to guarantee eventual executability of, a federal judgment," *Id.* at 357, 116 S.Ct. 862.

Goss involved an anti-suit injunction that was entered to ensure satisfaction of an antidumping judgment against a Japanese company. 491 F.3d at 358-59. New federal legislation repealed the antidumping statute under which the plaintiff in *Goss* had recovered, but did so only prospectively; in response, Japan enacted a law, the "Special Measures Law," that was intended to permit the defendant in *Goss* to seek return of the award in Japanese courts. *See Id.* The district court entered an anti-suit injunction prohibiting an action from being filed under the Special Measures Law; after the injunction was issued, the defendant paid the federal judgment in full. *See Id.*

Noting that "there [wa]s no longer an outstanding judgment to protect," the Eighth Circuit concluded the relevant "jurisdictional circumstances and comity concerns" now weighed in favor of ending the injunction. *Id.* at 368. With respect to comity, the Eighth Circuit concluded that (1) federal courts no

longer had any direct interest in the matter and (2) because the Japanese government had passed the Special Measures Law, Japanese courts should have an initial opportunity to determine the enforceability of the Special Measures Law. *See Id.* at 366-68. With respect to jurisdiction, the Eighth Circuit reasoned that, under *Peacock,* the district court retained ancillary enforcement jurisdiction only "*until* satisfaction of the judgment." *Id.* at 365 (citing *Peacock,* 516 U.S. at 356-57, 116 S.Ct. 862). It also noted that the All Writs Act, 28 U.S.C. § 1651(a), which permits federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions," did not provide a source of jurisdiction to enter the anti-suit injunction. *See* 491 F.3d at 364-65; *see also Syngenta Crop. Prot., Inc. v. Henson,* 537 U.S. 28, 33, 123 S.Ct. 366, 154 L.Ed.2d 368 (2002) (stating that "the All Writs Act does not confer jurisdiction on the federal courts"). Nor did the Eighth Circuit find any other source of jurisdiction to support the anti-suit injunction.

While "[t]he boundaries of ancillary jurisdiction are not easily defined and the cases addressing it are hardly a model of clarity," *Garcia v. Teitler,* 443 F.3d 202, 208 (2d Cir.2006), we conclude that federal courts have continuing jurisdiction, grounded in the concepts of *res judicata* and collateral estoppel, to enjoin a party properly before them from relitigating issues in a non-federal forum that were already decided in federal court. This source of jurisdiction remains even after a judgment has been satisfied-regardless of whether (1) the judgment is one of dismissal or (2) the font of jurisdiction for such an injunction is characterized as "ancillary" or

otherwise.[18] *See, e.g., Choo,* 486 U.S. at 147, 108 S.Ct. 1684 ("[A] federal court [may] prevent state litigation of an issue that previously was presented to and decided by the federal court. [This power] is founded in the well-recognized concepts of *res judicata* and collateral estoppel."); *Id.* at 150-51, 108 S.Ct. 1684 (affirming anti-suit injunction protecting from relitigation a ruling in earlier federal judgment of dismissal); *Local Loan Co. v. Hunt,* 292 U.S. 234, 239, 54 S.Ct. 695, 78 L.Ed. 1230 (1934) ("That a federal court of equity has jurisdiction of a bill ancillary to an original case or proceeding in the same court, whether at law or in equity, to secure or preserve the fruits and advantages of a judgment or decree rendered therein, is well settled."); *Smith,* 399 F.3d at 431-36 (affirming anti-suit injunction based on judgment dismissing claims as time-barred); *Paramedics,* 369 F.3d at 654 ("An anti-suit injunction may be needed to protect the court's jurisdiction once a judgment has been rendered."); *see also Covanta Onondaga,* 318 F.3d at 398 ("Even in the absence of a pattern of vexatious litigation ... a district court that has adjudicated the merits of a case may have authority to prevent relitigation."); 18 James Wm.

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[18] *Peacock*'s statement that federal courts' power to engage in "supplementary proceedings *involving third parties* to assist in the protection and enforcement of federal judgments" does not "extend[ ] beyond attempts to execute, or to guarantee eventual executability of, a federal judgment,"516 U.S. at 356-57, 116 S.Ct. 862 (emphasis added), does not affect our analysis. Pertamina is not a third party, and the injunction was not entered merely to facilitate execution of the federal judgment. Rather, the injunction was entered to *protect* the federal judgment from being undermined or vitiated in foreign proceedings *by a party before* the District Court.

Moore, *Moore's Federal Practice* § 131.53 (perm. ed.2006) (noting that "a district court retains jurisdiction to enforce the judgments it enters"); 17A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 4226 (perm. ed. 2007) ("No independent basis of jurisdiction is required for a federal court to entertain an application to enjoin relitigation in state court.").

Accordingly, we conclude that the District Court retained-and retains-continuing jurisdiction to maintain the anti-foreign-suit injunction even though the federal judgments against Pertamina have been satisfied. While an anti-foreign-suit injunction should not be made permanent absent a need for such relief, *see, e.g., Ibeto Petrochemical,* 475 F.3d at 65 (modifying injunction where there was "no need for the permanent injunction that the District Court seems to have issued"),[19] entry of a permanent injunction was fully justified in this case. Were we to vacate the District Court's injunction, Pertamina would be free to engage in vexatious proceedings that, as discussed, are intended to undermine or vitiate federal judgments; the District Court did not err in determining that a permanent injunction was necessary in these circumstances.

D. The Injunction Should Be Modified Slightly

Although the injunction could be read to bar any

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[19] Moreover, as *Goss* suggests, a federal court may in some circumstances (not presented here) have a diminished need for an anti-suit injunction to protect a judgment once ancillary proceedings to satisfy the judgment have run their course.

other action related to the Award, the parties agree that the injunction does not bar confirmation proceedings currently underway in other nations. It would be inconsistent with our obligations under the Convention to bar good-faith litigation over the Award in Switzerland, the jurisdiction with primary authority over the Award.[20] Accordingly, we modify the injunction slightly to clarify that the injunction has, no effect on confirmation proceedings contemplated by the New York Convention in other jurisdictions, and moreover, permits Pertamina to return to the District Court to seek relief from the injunction in the event that it demonstrates its good faith in seeking an opportunity to challenge the Award in Switzerland. *Cf. Smith,* 399 F.3d at 436 (modifying anti-suit injunction to avoid having it "inadvertently sweep too broadly").

For the reasons stated above, the judgment of the District Court is affirmed as modified.

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[20] While there is no indication that Pertamina could return to Switzerland in order to seek annulment of the arbitration award, KBC could not say definitively at oral argument that Pertamina would be time-barred from seeking to annul the Award in that jurisdiction on the basis of the alleged fraud. [Hr'g Tr. 53]

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

IN THE MATTER OF AN ARBITRATION BETWEEN
KARAHA BODAS COMPANY, L.L.C.,
Petitioner,

v.

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA ("PERTAMINA"),
Respondent.

21-MC-00098 (TPG)

December 19, 2006

Order and Judgment Granting Declaratory and Injunctive Relief

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On December 8, 2006, this Court issued an Opinion granting KBC's Motion for Injunction Concerning Litigation in the Cayman Islands (the "Motion"). In accordance with that Opinion, which is attached hereto and made a part hereof, it is hereby ORDERED AND ADJUDGED, effective immediately:

1. The Court hereby declares that all sums paid or turned over to KBC as a result of proceedings

before this Court in satisfaction of the Final Arbitral Award issued on December 18, 2000 (the "Arbitral Award") (such sums, the "Award Proceeds") are the property of KBC, and that KBC may use or dispose of the Award Proceeds in any manner, including, without limitation, distribution by KBC to its members and stakeholders.

2. Pertamina is hereby permanently enjoined from prosecuting, proceeding with, or otherwise taking any actions in support of the lawsuit it commenced against KBC in the Grand Court of the Cayman Islands (the "Cayman Islands Court") on or about September 15, 2006 (such lawsuit bearing Cause No. 386 of 2006) and Pertamina is hereby ordered to immediately (a) provide a copy of this Order and Judgment to the Cayman Islands Court, and (b) file appropriate papers in the Cayman Islands Court seeking a stay of that lawsuit until a decision is made on any appeal of this Order and Judgment. In the event that the Court of Appeals affirms this Order and Judgment (or in the event no appeal is timely taken), Pertamina shall within ten days file appropriate papers in the Cayman Islands Court voluntarily dismissing that lawsuit with prejudice.

3. Pertamina is hereby permanently enjoined from making a claim or commencing an action in any court or tribunal claiming injury resulting from the Arbitral Award or seeking to recover, by way of an award of damages or otherwise, the Award Proceeds or any other sums or losses allegedly incurred as a result of the Arbitral Award.

4. Pertamina is hereby permanently enjoined from making a claim or commencing an action in any

court or tribunal seeking to annul, amend, or modify the Arbitral Award, except that Pertamina may continue to raise any defenses it may have against the enforcement of the Arbitral Award in any proceedings initiated by KBC to enforce the Arbitral Award in other jurisdictions.

5. Pertamina is hereby permanently enjoined from commencing any action or making any motion seeking relief from the Final Judgment entered by the United States District Court for the Southern District of Texas on December 4, 2001 and registered in this Court on February 22, 2002.

6. Pertamina is hereby permanently enjoined from making or prosecuting any request for an order or injunction that would interfere with KBC's use or disposition of the Award Proceeds, including, without limitation, applying for a Mareva Injunction. Nothing in this Order and Judgment should be construed, however, as preventing Pertamina from raising and pursuing any defenses and/or objections that it may have in connection with proceedings initiated by KBC in other jurisdictions. In particular, nothing in this Order should be construed as preventing Pertamina from raising defenses and/or objections or otherwise litigating (including, without limitation, pursuing appeals and seeking costs and attorneys' fees) against KBC in connection with proceedings initiated by KBC (prior to the filing of KBC's Motion) in the jurisdictions of Canada (such proceedings bearing Action No. 0203 3768, in The Court of Queen's Bench of Alberta, Judicial District of Edmonton), Hong Kong (such proceedings bearing case number HCCT 28/2002 and appeal number CACV 121/2003), and Singapore (such proceedings

corresponding to Originating Summons No. 342 of 2002/Y). In the event that Pertamina violates this Order and Judgment and obtains an order of any court, tribunal, or other body purporting to interfere with KBC's right to dispose of the Award Proceeds, KBC shall be under no obligation to comply with such order.

7. This Order and Judgment supersedes the following orders, each of which is hereby and immediately vacated: (a) the September 27, 2006 Order of this Court (Docket No. 169), and (b) the September 27, 2006 Memorandum of this Court.

8. This Order and Judgment constitutes a final decision of this Court within the meaning of 28 U.S.C. § 1291.

9. This Court expressly retains jurisdiction of this matter for purposes of enforcing this Order and Judgment to the fullest extent permitted under the Constitution and laws of the United States.

10. The Court will entertain a motion by Pertamina for a stay pending appeal in accordance with Rule 62(c) of the Federal Rules of Civil Procedure or any other applicable provision of law. Any such motion must be made in writing within five days of the date of entry of this Order and Judgment. Pending this Court's adjudication of any such motion, KBC shall continue to hold the Award Proceeds in the manner provided in the September 27, 2006 Memorandum.

Dated this 19th day of December, 2006

/s/

Thomas P. Griesa
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In the Matter of An ARBITRATION BETWEEN KARAHA BODAS COMPANY, L.L.C., *Petitioner*,

v.

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA ("PERTAMINA"), *Respondent*.

No. 21-MC-00098 (TPG)

Dec. 8, 2006

Christopher F. Dugan, Paul, Hastings, Janofsky & Walker LLP, Washington, DC, for Petitioner.

Henry Weisburg, Shearman & Sterling LLP, New York City, for Respondent.

GRIESA, District Judge.

Karaha Bodas Company ("KBC") moves for an order prohibiting Pertamina from engaging in certain legal proceedings in the Cayman Islands and from initiating similar proceedings in other jurisdictions. The motion is granted. In addition, the Court will enter a declaratory judgment based on certain conclusions reached in this opinion.

Facts

The Arbitral Award

In 1994 KBC, a Cayman Islands limited liability company formed by two American power companies and other investors, executed two contracts with Pertamina, an oil and gas company owned and controlled by the Republic of Indonesia. The contracts established a joint venture for the exploration of geothermal energy resources in the Karaha area of West Java, Indonesia. In 1997 the projects were suspended by Indonesian Presidential Decrees. As a result, on April 30, 1998, KBC commenced arbitration proceedings in Switzerland for breach of contract by Pertamina. On December 18, 2000, the Tribunal awarded KBC $261.1 million.

In February 2001 Pertamina attempted to challenge the award in the Swiss Supreme Court, on grounds that are not explained on the record in the present motion. The Swiss court denied Pertamina's application for failure to timely pay court fees. Pertamina next challenged the award in the Jakarta District Court in Indonesia. The Jakarta court granted Pertamina's request to annul the award in August 2002, but on March 23, 2004, the Indonesian Supreme Court reversed.

Confirmation Proceedings in the United States

In early 2001, KBC brought an action in the United States District Court for the Southern District of Texas to confirm the Arbitral Award. On December 4, 2001, that court granted summary

judgment in favor of KBC and confirmed the award. Pertamina filed a notice of appeal, and a year later-months after the briefing on the appeal was concluded-Pertamina moved under Fed.R.Civ.P. 60(b) in the Texas district court to set aside the judgment. Pertamina sought to set aside the judgment because (1) there was newly discovered evidence of political risk insurance coverage pursuant to which KBC's investors were paid $75 million and (2) the Jakarta District Court annulled the underlying Arbitral Award in August 2002. The Fifth Circuit remanded the case to the district court to consider the merits of the Rule 60(b) motion. The district court denied Pertamina's motion in two separate opinions on April 16 and May 30, 2003. The Fifth Circuit on March 23, 2004, affirmed both the district court's December 2001 judgment and the Rule 60(b) decisions of 2003. On October 4, 2004 the United States Supreme Court denied certiorari.

Pertamina's Claim of Fraud

Pertamina claims that KBC committed fraud in connection with the joint venture and the arbitration. It is important to note that Pertamina's claim of fraud was not presented in the arbitration itself or in any of the proceedings described above in the Swiss Supreme Court, the Jakarta District Court, the Southern District of Texas, the Fifth Circuit, or the United States Supreme Court. However, the fraud claim was presented in certain proceedings in Hong Kong and Singapore, as will be described. More importantly, Pertamina's claim of fraud is the basis of its action in the Cayman Islands, which is the subject of the present motion.

Specifically, Pertamina alleges that KBC fraudulently overstated the size of geothermal resources in 1997 and relied on those falsehoods in the arbitration proceedings. In its Statement of Claim dated October 6, 2006, filed with the Cayman Islands court, Pertamina attempts to present a detailed list of the specifics of the alleged fraud. But the details all relate the basic claim that KBC overstated the size of geothermal resources. It should be noted that, although there is no indication that the claim of fraud was literally presented to the Arbitral Tribunal, the issue of the quantity of geothermal resources was surely put forward. Paragraph 129 of the Final Award describes the fact that Pertamina claimed that the representations made by KBC "were suspect since the quantities of reserves indicated" in one analysis by KBC "had been significantly increased without justification" in a later analysis. In paragraph 131, the Arbitral Tribunal recognizes the possibility that the amount of reserves put forward by KBC may have been overestimated, and states that the Tribunal would give weight to this circumstance in making the allowance for lost profits. The result was that, whereas KBC had claimed lost profits of $512.5 million, the Tribunal, in paragraph 136, only awarded $150 million.

Pertamina asserts that its claim of fraud is based upon new evidence. There is an issue about when Pertamina knew, or should have known, about this alleged new evidence. Such evidence is in fact contained in documents turned over to Pertamina by KBC. The parties dispute when the documents were

received by Pertamina. KBC claims that the documents were turned over in March 2001, when KBC relinquished its offices and files to Pertamina. However, Pertamina insists that the documents were not received until November 2002, when a KBC employee delivered twelve boxes of documents to Pertamina's Geothermal Office. Regardless, Pertamina asserts that "no one looked through them until August 2005 when Pertamina's advisors came and inspected them" (Statement of Bambang Kustono, October 13, 2006).

Foreign Confirmation/Registration Proceedings

In addition to bringing the action in the federal court in Texas, KBC brought confirmation/registration proceedings in Hong Kong, Singapore and Canada. On March 27, 2003, the Hong Kong court granted KBC's application to register the award and denied Pertamina's attempt to set it aside. An appeal was partially heard in December 2003, but the appeal was adjourned pending the outcome of the Fifth Circuit's decision in the United States. The appeal was scheduled to be heard in February 2006. Pertamina filed a Supplementary Notice of Appeal, including allegations of fraud. The exact status of that matter is not clear. However, KBC recovered $898,682.90 in Hong Kong to be applied to the amount owed by Pertamina under the Arbitral Award.

On March 14, 2002 the High Court of the Republic of Singapore granted KBC's application to register its award. Pertamina's application to set

aside the order, also filed in 2002, was held in abeyance pending the outcome of proceedings in the United States. In late January 2006, Pertamina informed the Singapore court of its fraud allegations in a conference. KBC made various applications to the Singapore court in an attempt to defer further litigation until after the termination of proceedings in the United States, but the court denied KBC's applications. Eventually, KBC voluntarily dismissed its action in Singapore.

On December 8, 2004, a Canadian court granted summary judgment in favor of KBC and confirmed the award. Pertamina's appeal is currently still pending. There is no indication that Pertamina has brought up its fraud allegations in the Canadian proceeding.

Execution Proceedings in the Southern District of New York

When Pertamina appealed the Texas district court's decision in early 2002, it declined to file a supersedeas bond pursuant to Fed.R.Civ.P. 62(d) in order to obtain a stay of the judgment pending appeal. As a result, KBC sought and was granted permission by the district court to register its judgment in other judicial districts in the United States under 28 U.S.C. § 1963. On February 22, 2002, KBC registered its Texas district court judgment with the United States District Court for the Southern District of New York, and commenced execution proceedings. On the same day, the Southern District issued ex parte writs of execution permitting KBC to serve restraining notices upon a

number of banks in New York, and also served orders on Pertamina to show cause why KBC could not execute upon any property of Pertamina within this jurisdiction in satisfaction of the judgment. KBC promptly issued notices to, inter alia, the Bank of America and the Bank of New York to restrain funds flowing through twenty-four trust accounts maintained in Pertamina's name at those banks in this district.

In March 2002, the Ministry of Finance of the Republic of Indonesia filed a motion to quash the restraining notices and the writs of execution arguing that it-and not Pertamina-owned the restrained assets. To the extent that Pertamina owned the funds, KBC could have execution on its judgment, but only to that extent. On April 24, 2002, this Court held that, with respect to fifteen of the twenty-four accounts, Pertamina only owned a portion of the funds in the accounts. The fifteen accounts ("Adjudicated Accounts") contained revenues from the sale of Liquefied Natural Gas, and the Court held that Pertamina only had a property right in those funds to the extent of its Retention Fee. The remainder belonged to the Ministry. The Retention Fee, explained in detail in other opinions of this Court, is Pertamina's share of income from projects it undertakes with private contractors. Additionally, the Court noted that the record was insufficient to determine ownership of the funds in the remaining nine accounts. The Court certified the April 24 order for immediate appeal and stayed it pending the appeal. The stay prevented actual disbursement to KBC. The Second Circuit affirmed on December 10, 2002, but ordered this Court to

continue the stay until the parties' rights in all of the funds were determined.

After the Second Circuit's December 2002 ruling, Pertamina and the Ministry sought to limit the amount of the Retention Fees subject to the restraining notices by contending that the effect of the restraining notices as to the Adjudicated Accounts ceased in June 2002, rather than continuing through that year and thereafter, as argued by KBC. This issue was raised in motions made, briefed, and argued in 2003 in this Court. In an opinion on January 29, 2004, this Court held that the effect of the restraining notices did not terminate in June 2002, but continued through 2002 and into 2003, and would continue, until the amount of the judgment plus interest was secured.

On April 6, 2004, KBC filed a "Motion for Turnover of Retention Fees Accrued Through November 2003." This motion was precipitated by a November 21, 2003 letter sent from the Ministry to the Governor of the Bank of Indonesia terminating the payment of Retention Fees to Pertamina. More importantly, Pertamina and the Ministry took the position that the letter was a confirmation of prior legal enactments, which had already terminated the Retention Fees as of January 1, 2003. KBC argued to the contrary. On May 19, 2004, this Court held that Pertamina earned Retention Fees through November 21, 2003. The Court noted that the positions taken by Pertamina and the Ministry during all of the 2003 litigation were contrary to the position it now took in opposition to the Turnover Motion and as a result its assertion on the Turnover Motion could be given no

weight. KBC's motion was granted but the Court ordered the actual turnover stayed in accordance with its previous orders.

On October 6, 2004, after two days of argument and testimony, the Court held that the funds restrained in the remaining "unadjudicated" accounts belonged to Pertamina. Then, on October 22, this Court issued its final judgment ordering a turnover of the amount of the award plus interest to KBC, but stayed the award pending appeal. The Second Circuit summarily affirmed the judgment on March 9, 2006. Pertamina then applied to the Supreme Court for certiorari.

KBC had moved to impose sanctions on Pertamina and its attorneys. Oral argument on this motion was held on August 25, 2006. In the course of the hearing, the Court asked whether, if the Supreme Court denied certiorari, the funds restrained in New York would be paid to KBC and there would be "no further issue." (Minutes pp. 14-15). The attorney for KBC replied that there was a further issue that had come up recently in the proceedings brought by KBC in Singapore, where Pertamina raised the claim that KBC had obtained the Arbitral Award by fraud. The KBC attorney said that Pertamina had told the court in Singapore that if that court issued a finding of fraud, Pertamina "was going to start a new action in the United States to try to recover all the funds that had been paid, a new fraud action in the United States." In the sanctions hearing, the Court then questioned counsel for Pertamina:

> [W]hat about that? Is there any intention to have further litigation, or can we end it? If the Supreme Court denies cert., will the money simply be paid to KBC or not?

The Pertamina attorney replied that he had no instructions to commence an action. The Court then asked for a more definite statement of Pertamina's position, as follows:

> The question is, and I have absolutely a good reason for asking such a question in view of the record here, I want to know, assuming that the Supreme Court denies cert., I want to know if Pertamina will now agree to the payment of the judgment, which would mean the release of the funds which are now held to secure that judgment, immediate release.

(Minutes pp. 16-17). On August 28, 2006 the attorney for Pertamina wrote the Court as follows:

> Pursuant to the Court's direction, we are writing to address the question posed by the Court at last Friday's hearing with respect to the payment of the outstanding portion of KBC's judgment by Pertamina. Our understanding of Your Honor's question is whether, in the event that the Supreme Court denies the petitions for certiorari filed by Pertamina and the Ministry of Finance of the Republic of Indonesia, Pertamina will agree to the payment of KBC's judgment. We have been instructed by Pertamina to inform the Court and counsel for KBC that, in the event that

> the Supreme Court denies the pending petitions, and assuming that the Court issues a turnover order with respect to the restrained funds appropriate in form and amount, Pertamina will not object before this Court to the payment of the judgment.

On October 2, 2006 the Supreme Court denied Pertamina's certiorari petition.

The Cayman Islands Action

A little over two weeks after the August 28 letter, on September 15 Pertamina commenced an action against KBC in the Grand Court of the Cayman Islands for fraud in connection with the joint venture and the arbitration. Pertamina's New York attorney wrote the Court on September 19, 2006 stating that he was "unaware on August 25 that such a proceeding was planned." Presumably the attorney meant August 28, the date of his letter. However, there can be no doubt about the fact that Pertamina was planning the Cayman Islands action as of August 28, and probably for a substantial period of time before that. Also, there can be no doubt about the fact that both Pertamina and its attorneys knew full well that the Court's questions were directed to finding out whether the Supreme Court's denial of certiorari would mean final termination of all litigation, so that KBC could be paid out of the funds restrained in New York. Obviously the Court did not know enough to ask specifically if Pertamina planned to bring a new action in the Cayman Islands. But an honest look at the Court's inquiry and an honest response would have led to the disclosure of the plan

to bring such an action.

There was, of course, no such disclosure. The circumstances strongly support an inference that concealment by Pertamina was deliberate and with a purpose. Now that an action has been brought, Pertamina is asserting that this Court cannot interfere with such an action because such interference would tread on the sovereignty of a foreign state. Had the plan for an action been disclosed beforehand, there may well have been legal issues about how to deal with Pertamina's strategy, but the case law about anti-suit injunctions, now relied on by Pertamina, would not have been directly applicable.

Pertamina alleges in the Cayman Island action that KBC overstated the size of geothermal resources in 1997 and relied on those falsehoods in the arbitration proceedings. The statement of plaintiff's claim in the action is contained in the Writ of Summons, dated September 15, 2006, and signed by Pertamina's Cayman Islands attorney. Pertamina claims that the fraud of KBC affected various notices issued by KBC to Pertamina in 1997. Pertamina further contends that KBC was guilty of fraud in presenting the Notice of Arbitration dated April 30, 1998 and in the procuring of the Arbitral Award dated December 18, 2000, and that the fraud was "such as to vitiate the Arbitral Award." (Writ of Summons ¶ 1). Pertamina seeks damages, accounting, and restitution, as well as

> An injunction restraining the defendant ... from (i) dealing with or disposing of, in any

> manner whatsoever, any sums received ... as a consequence of the said fraud ... and (ii) taking any steps whatsoever in furtherance of the said wrongs including ... commencing or continuing or prosecuting or assisting in the prosecution of any proceedings directed to enforcing, whether by themselves or by assignment, and/or from receiving the benefit by enforcing, the Arbitral Award.

(Writ of Summons ¶ 9). On September 21 Pertamina filed an Amended Summons with the Cayman Islands court, requesting

> That the defendant ... be restrained until the conclusion of the trial of this action or further order in the meantime from taking any steps to dispose or direct the disposal of any funds belonging to or in the name of or due to Plaintiff [Pertamina] collected or received by way of enforcement of the Arbitral Award dated 18 December 2000 entered in favor of Defendant [KBC] against the Plaintiff following the initiation of arbitration proceedings by the Defendant through the Notice of Arbitration dated 30 April 1998, ...

(Am. Summons ¶ 2). The Amended Summons also requests that KBC be restrained in the terms of an attached Draft Order. This Draft Order, entitled "Injunction Prohibiting Disposal of Assets Worldwide," would prohibit KBC from disposing of its assets up to $316 million, whether in or outside the Cayman Islands, and specifically includes within the definition of assets, "any sums received or to be

received by the Defendant pursuant to any order of the United States District Court for the Southern District of New York ... pursuant to proceedings issued by the Defendant directed to enforcing the Arbitral Award."

Other materials relating to the Cayman Islands action, which have been filed by Pertamina on the current motion before the Southern District, are as follows:

> Affidavit of Simson Panjaitan, dated September 21, 2006.
>
> "Skeleton Argument," dated September 22, 2006.
>
> Amended Writ of Summons, dated October 6, 2006.
>
> Statement of Claim, dated October 6, 2006.

As will be described more fully later in this opinion, an important, and perhaps essential, argument of Pertamina in opposing KBC's current motion is that the action in the Cayman Islands is not to set aside the Arbitral Award, but is "a totally new fraud claim." What has just been quoted from the pleadings in the Cayman Islands action bears, of course, on that issue. In addition, the Court notes the portion of the document entitled "Skeleton Argument," dealing with the remedies sought in the Cayman Island proceedings. According to paragraph 7 of that document, Pertamina is seeking damages and ancillary orders. The damages sought are the amount

of the Arbitral Award, Pertamina's costs in the arbitration, and interest on those sums. As to ancillary orders, paragraph 7 states that "a finding of fraud would mean that the award is vitiated by fraud and a nullity," which "would preclude any further enforcement actions by KBC." Pertamina seeks to have the Cayman Islands court "restrain KBC from taking any such steps."

The Amended Writ of Summons, dated October 6, 2006, is the same, in all material respects, as the original Writ of Summons, and contains the same language quoted from the original Writ of Summons earlier in this opinion.

The Statement of Claim, dated October 6, 2006, contains a section entitled "Particulars of Loss and Damage" in paragraph 54. These are consistent with what is in the Skeleton Argument.

The Current Motion

On September 21, 2006 KBC filed its motion in the Southern District requesting an order prohibiting Pertamina from engaging in legal proceedings in the Cayman Islands. In its brief Pertamina expanded the motion to embrace any similar actions in other jurisdictions. Oral argument was held on September 26.

During the argument, counsel for Pertamina represented that by bringing suit in the Cayman Islands, Pertamina was not seeking to interfere with the mechanisms of this Court and stated that Pertamina would not oppose the turnover of funds to

KBC in the event that the Supreme Court denied certiorari. However, counsel did not agree that Pertamina would withdraw the claim that the fraud vitiated the Arbitral Award. Moreover, counsel took the position that Pertamina (while agreeing, through New York counsel, to have the funds turned over to KBC) was free to petition the Cayman Islands court to enjoin KBC from distributing or disposing of the funds that it received from the litigation in the federal court in New York.

In view of the uncertainty as to how quickly the Cayman Islands court might move, at least with respect to provisional relief, the federal court at the September 26 oral argument issued an immediate order, which was in effect a temporary restraining order. This was embodied in a formal order of September 27, as follows:

> 1. Pertamina agrees to, and this court orders, that Pertamina is prohibited from making, or proceeding with any request to the courts in the Cayman Islands (or any other forum) [for] an order or injunction that would interfere with the procedures of this court in enforcing the arbitration award, including turnover of restrained funds in the even that certiorari is denied by the Supreme Court.
>
> 2. Pertamina is prohibited from making, or proceeding with any request to the courts in the Cayman Islands (or any other forum) seeking any order or injunction against KBC interfering with KBC's use or disposition of funds that may be turned over to it as a result

of the proceedings in this court.

The Court did not make a final decision on KBC's motion, but reserved decision. The present opinion constitutes the Court's decision on that motion.

As noted above, on October 2, 2006 the Supreme Court denied certiorari. Prior to this time a total of $55,243,209.70 had been paid to KBC out of the funds restrained in New York. As noted earlier, KBC recovered $898,682.90 in Hong Kong. After the Supreme Court action, KBC requested that the additional sum of $260 million be turned over to KBC from the funds restrained in New York. A small additional amount was thought to be due when the final calculations were made, but KBC wished to have immediate payment of $260 million. Accordingly, on October 6 the Court signed an Interim Turnover Order directing that $260 million be turned over to KBC immediately. However, this was subject to the direction the Court had issued in a memorandum of September 27 to the effect that KBC could not distribute these funds without further permission of the Court. The purpose of this was to allow the Court to make a final ruling on KBC's motion, and specifically to deal with Pertamina's claim that it could use the Cayman Islands action to prevent KBC from disposing of the funds. KBC had represented to the Court that it would, if allowed to proceed normally, distribute the funds as dividends to the owners of KBC.

On November 15, 2006 a Stipulation and Order was entered, providing for the payment of a final $3,469,268.43 to KBC. This finally satisfies the

judgment. A grand total of $319,611,161.03 has been paid. The September 27 memorandum applies to both the $260 million and the $3,469,268.43, but not the $55,243,209.70, which is no longer in KBC's hands.

Discussion

The Nature of the Cayman Islands Action

In arguing the motion now before the Southern District, Pertamina lays considerable emphasis on the idea that Pertamina is not suing in the Cayman Islands to set aside the Arbitral Award, but is making a "new fraud claim" for damages. At the argument of the motion on September 26, 2006, the Court asked if the action in the Cayman Islands was the first time that Pertamina engaged in affirmative litigation to set said the Arbitral Award for fraud, as distinct from using fraud allegations to defend enforcement proceedings by KBC. (Minutes pp. 36-37). Counsel for Pertamina responded as follows:

> But I would disagree, your Honor, the action in Cayman is not to set aside the arbitration award. It's a totally new fraud claim, as I understand it.

* * * * * *

> No, it is to-it is a damage claim, your Honor, it is to get damages for an alleged fraud.

(Minutes p. 38).

It is not entirely clear why Pertamina seeks to make this distinction. The Cayman Islands action is what it is, and labels do not change it. In any event, the theory that the Cayman Islands action is nothing but a "new fraud claim," merely seeking damages is wholly without substance.

To be sure, Pertamina alleges fraud in the Cayman Islands court. However, the entire point of the fraud allegations is to show that the Arbitral Award must be deemed to be vitiated- i.e., to be a nullity. The "damages" sought are almost entirely the amount of the Arbitral Award plus the interest which has accrued during enforcement proceedings.

Although counsel for Pertamina stated at the September 26 hearing that Pertamina has no intention to use the Cayman Islands action for the purpose of enjoining proceedings in the United States courts, that is exactly what is sought both in the original Writ of Summons and the Amended Writ of Summons.

It is true that there was very little left to enjoin, in connection with the proceedings in the United States courts, when the Cayman Islands action was commenced. But this does not take away from the fact that Pertamina filed suit in the Cayman Islands with the clear objective of stopping whatever could be stopped by way of legal proceedings to enforce the Arbitral Award. Pertamina is still seeking to achieve that objective.

At the time the Cayman Islands action was brought, Pertamina's petition for certiorari was still

pending before the United States Supreme Court. Of course, there was no attempt to have the Cayman Islands court interfere with what was going on in the Supreme Court. After the Supreme Court denied certiorari, all that was left was to have judgment entered directing that restrained funds be turned over to KBC to satisfy the Texas federal court judgment. In the August 28, 2006 letter, counsel for Pertamina had stated that "Pertamina will agree to the payment of KBC's judgment," in the event that the Supreme Court denied certiorari.

What was in fact left for Pertamina to restrain by way of the Cayman Islands action? In fact, Pertamina found something of great importance. In the Amended Summons of September 21, 2006 Pertamina requested the Cayman Islands court to issue an order to the effect that KBC would be restrained from disposing of any funds collected through the enforcement of the Arbitral Award.

But the basic nature of the Cayman Islands action was confirmed in the Amended Writ of Summons filed by Pertamina on October 6, 2006. This was after the Supreme Court had denied certiorari. It was after counsel for Pertamina had stated at the September 26 hearing that in the Cayman Islands action Pertamina was not seeking to interfere with the mechanisms of this Court. It was after an affidavit of a Pertamina officer filed with the Cayman Islands court, purporting to make the same point. Nevertheless the October 6 Amended Writ of Summons repeated the allegations and claims of the original Writ of Summons of September 15, contending that the Arbitral Award should be

considered "vitiated" and that KBC should be restrained from prosecuting any proceedings to enforce the Arbitral Award. This showed that the purpose of the Cayman Islands action was and still is to halt, in whatever way is available, the judicial proceedings in the United States and the consummation of those proceedings.

It should be noted that, out of the $319 million collected by KBC, as described earlier, approximately $55 million has already been distributed to the owners of KBC. The sum of approximately $263 million, recently turned over to KBC is still in KBC's hands. It is this amount which would be reached if the Cayman Islands court entered an order restraining KBC from disposing of funds.

It is apparent beyond question that the effort to prevent KBC from using the money, as a full owner of such money, is part and parcel of the attempt to nullify the Arbitral Award. If the action in the Cayman Islands were about some completely unrelated matter, and the effort to restrain KBC from disposing of the funds were for the purpose of securing a judgment in such unrelated matter, that would be a completely different situation. But the Cayman Islands actions is all about defeating KBC's Arbitral Award, and is about preventing KBC from realizing the funds of that award.

Beyond this, the Cayman Islands action has the obvious purpose of nullifying the judgment of the federal court in Texas confirming that award and the judgments of the Southern District of New York, allowing KBC to recover from funds restrained in

New York. The objective of the Cayman Islands action is to prevent the completion and consummation of the carrying out of those judgments.

Remedies to Vacate Judgment

As was just explained, Pertamina is in effect seeking to overturn not only the Arbitral Award, but the judgments of the federal courts in Texas and New York. To do so, Pertamina has commenced the action in the Cayman Islands. KBC, at least at the present, is not relying upon the presentation of defenses to the Cayman Islands court. KBC is moving in the Southern District of New York to prevent Pertamina from going forward with its Cayman Islands suit. This necessarily requires consideration of the judicial authorities relating to anti-suit injunctions. These authorities will be discussed in the next section of this opinion. However, the Court has thought it instructive to discuss United States law regarding the ability of a judgment creditor to set aside the judgment against him on grounds of fraud.

Fed.R.Civ.P. 60(b)(3) allows a motion to be brought to relieve a party from a final judgment for "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." A party bringing a Rule 60(b)(3) motion must establish by clear and convincing evidence "(1) that the adverse party engaged in fraud or other misconduct, and (2) that this misconduct prevented the moving party from fully and fairly presenting his case." *Hesling v. CSX Transp., Inc.*, 396 F.3d 632, 641 (5th Cir.2005). Additionally, Rule

60(b) requires that the motion be brought in the court that rendered the judgment, within one year of the judgment.

Rule 60(b) goes on to provide:

> This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court.

It should be noted that the reference to 28 U.S.C. § 1655 has no relation to the present case. It concerns the enforcement of liens against absent defendants.

The provision for "an independent action" is designed to preserve the traditional remedy in equity to overturn judgments. 12 Moore's Federal Practice § 60.80. The most common ground asserted in independent actions is fraud. *Id.* § 60.81. Although it is not entirely clear from the text, the drafters of the rule apparently intended to distinguish between an "ordinary" independent action for fraud, and an action charging "fraud on the court," although the two are (understandably) sometimes confused. *Id.* §60.81[1][b] [v]. "Fraud upon the court" refers to matters such as the bribery of a judge, jury tampering, or fabrication of evidence by an attorney. Illustrative cases are *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246, 64 S.Ct. 997, 88 L.Ed. 1250 (1944); *Root Refining Co. v. Universal*

Oil Prods. Co., 169 F.2d 514 (3d Cir.1948); and *Platt v. Threadgill*, 80 F. 192 (C.C.W.D.Va.1897). It appears that the general provision about "an independent action" may allow claims of fraud on a broader basis. However, for reasons that will appear, it is not necessary in the present case to be concerned about the possible distinctions in the rule or about the exact boundaries of an independent action seeking to set aside a judgment for fraud.

The important thing, for present purposes, is to recognize that the use of an independent action to set aside a judgment for fraud has definite limitations under the decided cases. The Supreme Court has stated in *United States v. Beggerly:*

> Independent actions must, if Rule 60(b) is to be interpreted as a coherent whole, be reserved for those cases of "injustices which, in certain instances, are deemed sufficiently gross to demand a departure" from rigid adherence to the doctrine of res judicata. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244, 64 S.Ct. 997, 88 L.Ed. 1250 (1944).

524 U.S. 38, 46, 118 S.Ct. 1862, 141 L.Ed.2d 32 (1998). The Supreme Court went on to state that "an independent action should be available only to prevent a grave miscarriage of justice." 524 U.S. at 47, 118 S.Ct. 1862. The Court reversed the vacating of a judgment, finding in that case that the failure to thoroughly search for certain records and to make full disclosure to the court rendering the judgment did not amount to grave miscarriage of justice. *Id.*

The Court did, however, cite *Marshall v. Holmes,* 141 U.S. 589, 12 S.Ct. 62, 35 L.Ed. 870 (1891), to illustrate when setting aside a judgment for fraud would be justified. There a judgment had been obtained by means of a forged letter.

The courts also adhere to the equitable rule that there must be a showing of no adequate remedy at law. *Cresswell v. Sullivan & Cromwell,* 922 F.2d 60, 71 (2d Cir.1990). The Second Circuit stated in *Campaniello Imports, Ltd. v. Saporiti Italia S.p.A.*,

> It is fundamental that equity will not grant relief if the complaining party has, or by exercising proper diligence would have had, an adequate remedy at law, or by proceedings in the original action ... to open, vacate, modify, or otherwise obtain relief against, the judgment.

117 F.3d 655, 662-663 (2d Cir.1997). Also, the party seeking relief must comply with the equitable "clean hands" standard. 12 Moore's Federal Practice § 60.82[2].

Although there is no statute of limitations for an independent action, the equity doctrine of laches applies. *Simons v. United States,* 452 F.2d 1110, 1116 (2d Cir.1971); 12 Moore's Federal Practice § 60.83.

It is obvious that the defenses and limitations just described will generally be applied in the courts where actions are brought to set aside the judgments.

In the present case, of course, KBC is not arguing these points in the Cayman Islands, but is moving to have the Southern District of New York prohibit Pertamina from proceeding further in the Cayman Islands. It is the view of this Court that the law about the use of independent actions to overturn judgments must be considered on the issue of whether KBC's motion should be granted.

Anti-Suit Injunctions

There are well-defined limits on anti-suit injunctions against suits in foreign countries. These limits are based largely on considerations of international comity. But where a judgment has been entered in an American court, that court has authority to enjoin a party before it from suing in a foreign country where such suit is an abusive attempt to undermine that judgment.

Judge Mukasey of this Court has observed that, "after judgment in the domestic litigation, some showing of harassment, bad faith or other equitable circumstance is sufficient to support enjoining the foreign litigation." *Farrell Lines Inc. v. Columbus Cello-Poly Corp.*, 32 F.Supp.2d 118, 131 (S.D.N.Y.1997), *aff'd sub nom, Farrell Lines Inc. v. Ceres Terminals Inc.*, 161 F.3d 115 (1998). Similarly, the D.C. Circuit has stated that when "the injunction is requested after a previous judgment on the merits ... a court may freely protect the integrity of its judgments by preventing their evasion through vexatious or oppressive relitigation." *Laker Airways Ltd. v. Sabena Belgian World Airlines,* 731 F.2d 909, 928 (D.C.Cir.1984).

On the other hand, Pertamina relies on a group of cases where courts have ruled that anti-suit injunctions should not be granted. *See e.g., China Trade & Dev. Corp. v. M.V. Choong Yong,* 837 F.2d 33, 36 (2d Cir.1987); *LAIF X SPRL v. Axtel, S.A. de C.V.,* 390 F.3d 194, 199 (2d Cir.2004). In those cases there were parallel proceedings occurring simultaneously in the United States and in a foreign forum. The principal case is *China Trade.* There, the Court was faced with a litigant who brought suit in Korea while the same issue was being litigated in the Southern District of New York. Emphasizing that parallel proceedings in two forums are "ordinarily tolerable" and should be allowed to proceed simultaneously, 837 F.2d at 36, the Court reversed the District Court's granting of the injunction. However, the holdings in *China Trade* and the other parallel proceedings cases, and what is referred to as "the *China Trade* test," are not applicable in the present case.

The case at hand is not a parallel proceedings case. Here judgments were entered in the American courts (Texas 2001 and New York 2004) well before the Cayman Islands action was commenced (September 2006). This is a case where the issue is whether there is a misuse of the foreign court to evade the American judgments. It is of interest that both Judge Mukasey and the D.C. Circuit gave consideration to international comity in accordance with the *China Trade* line of cases, but they acknowledged that a "more lenient standard" would apply once a judgment has been entered, and proceeded to speak decisively of the need to protect

against abusive foreign litigation mounted following entry of the American judgments. *Farrell,* 32 F.Supp.2d at 131; *see also Laker Airways,* 731 F.2d at 928; *Silva Run Worldwide Ltd. v. Gaming Lottery Corp.,* No. 96-Cv-3231, 2002 WL 975623, at *6-7, 2002 U.S. Dist. LEXIS 8307, at *20-21 (S.D.N.Y. May 8, 2002), *aff'd,*53 Fed. Appx. 597 (2d Cir.2002).

Aside from the need to protect against abusive foreign litigation, other considerations are relevant to the appropriateness of granting an anti-suit injunction. One concern is the need for the Court to protect its jurisdiction. Both *Laker Airways* and *China Trade* recognized the propriety of enjoining a suit in a foreign court where such an injunction is necessary to protect the American court's jurisdiction. *Laker Airways,* 731 F.2d at 927-31;China Trade, 837 F.2d at 36-37 (citing *Laker Airways,* 731 F.2d 909).

Another relevant consideration to this Court's ability to act in the face of comity considerations is the extent to which a litigant attempts to avoid the forum's important public policies. The D.C. Circuit commented that "deference to the foreign proceeding may be denied because of the litigant's unconscionable evasion of the domestic laws." *Laker Airways,* 731 F.2d at 931 n. 71. Indeed, the Second Circuit has held that "orders of foreign courts are not entitled to comity if the litigants who procured them have deliberately courted legal impediments to the enforcement of a federal court's orders." *Motorola Credit Corp. v. Uzan,* 388 F.3d 39, 60 (2d Cir.2004).

In the present case, Pertamina is seeking to

avoid the application of well-settled American law and policies about the limited methods which can be used to interfere with the normal finality of judgments.

It should be noted that KBC has once before sought an anti-suit injunction in this case. In March 2002, several months after the federal district court in Texas issued its final judgment in favor of KBC, Pertamina filed suit in Indonesia seeking to annul the Arbitral Award, and sought an injunction to prevent KBC from seeking to enforce the award. Before the application on the injunction was scheduled to be heard in Indonesia, KBC applied to the court in Texas for a temporary restraining order to prevent Pertamina from seeking its injunction in Indonesia. The district court granted KBC's application. Pertamina did not withdraw its request and the Indonesian court issued a provisional injunction. KBC then moved for a preliminary injunction against Pertamina's further pursuing the Indonesian action. The district court granted the injunction. The Fifth Circuit reversed. *Karaha Bodas Co., L.L.C., v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* 335 F.3d 357 (5th Cir.2003).

The Fifth Circuit's opinion rested chiefly on the idea that the New York Convention, the operative treaty under which KBC sought to enforce its award, allows simultaneous enforcement and annulment proceedings in other countries. As a result, the United States courts "have discretion under the Convention to enforce an award despite annulment in another country." *Id.* at 369. Thus, the "Indonesian court's annulment fails to jeopardize the

enforcement of the award elsewhere." *Id.* The court reasoned that since there was no real threat to enforcement in the United States, comity counseled against issuing the injunction.

Clearly, the anti-suit injunction sought now by KBC presents itself in a much different procedural and temporal context. The policies underlying the New York Convention no longer apply. Pertamina is not seeking to annul the award under the New York Convention's procedures and has no need of protection of any right under such Convention. Pertamina is indeed seeking to "jeopardize the enforcement of the award" in the United States by means of the injunction it is seeking in the Cayman Islands. Finally, the litigation has proceeded to an entirely different juncture than where it stood in 2003. The significance of this will be dealt with later in this opinion. In short, the Fifth Circuit's decision is not instructive on what should be done now.

An Injunction Should Be Issued

As already described, the motion before this Court is to enjoin Pertamina from pursuing the litigation in the Cayman Islands and similar litigation elsewhere. It is not for this Court to deal with the merits of Pertamina's suit in the Cayman Islands, or to determine whether Pertamina's allegations of fraud do or do not have merit. However, this Court does have the responsibility of making certain findings with respect to the nature of the Cayman Islands action in relation to federal court judgments in the United States.

The previous section of this opinion, dealing with Fed.R.Civ.P. 60(b), illustrates the fact that under American law, a final judgment in a litigation is given a very high degree of protection, and can be overturned in a new and independent lawsuit only under exceptional circumstances, even when fraud is alleged. One of these circumstances is where "fraud upon the court" is proven. However, no such thing is alleged in the Cayman Islands. No claim is made there of forged evidence or bribery or anything else of that nature. What is claimed in the Cayman Islands is that, during the dealings between KBC and Pertamina, KBC made misrepresentations regarding the quantity of geothermal reserves or resources. As already described, the issue of the accuracy of KBC's representations on this subject was before the arbitrators. What has now occurred is that Pertamina claims it has new evidence showing that KBC defrauded Pertamina on the subject of the quantity of geothermal reserves or resources, something which Pertamina apparently did not literally allege in the arbitration. There is surely a serious question about whether the situation involves the kind of gross injustice or grave miscarriage of justice, demanding a departure from adherence to the doctrine of res judicata, within the meaning of the Supreme Court's holding in *United States v. Beggerly,* 524 U.S. 38, 46-47, 118 S.Ct. 1862, 141 L.Ed.2d 32 (1998).

But beyond this, it is necessary to reckon with the tactics employed by Pertamina. The alleged new evidence of fraud comes from documents voluntarily turned over by KBC to Pertamina in Indonesia. KBC asserts that the documents became available to

Pertamina in March 2001. Pertamina states that it was not until November 2002 when this happened.

It will be recalled that summary judgment confirming the Arbitral Award was issued by the federal court in Texas on December 4, 2001. If Pertamina had the documents in March 2001, as KBC claims, it had ample time to file a motion under Rule 60(b)(3) in the Texas district court within the one year time limit. And even if Pertamina did not have the documents until November 2002, the one year time limit had still not expired at that time. Furthermore, even after the expiration of that one year, a prompt filing of an "independent action" could have brought Pertamina's fraud allegations before the Texas district court.

Of course, Pertamina asserts that it did not look at the documents until August 2005, and therefore did not appreciate their significance until that time. Even if this is true, there is surely a serious problem about Pertamina's diligence. During the arbitration, Pertamina had raised suspicions about the amount of reserves which KBC had represented, and this was enough of an issue to cause the arbitrators to cut substantially the amount of the award for lost profits from what KBC had requested. The award was still very large ($150 million) and Pertamina has fought strenuously to prevent KBC from recovering even the reduced award. In view of this campaign against KBC, it is difficult to justify Pertamina's delay of three years or more in looking at documents left in its possession by KBC.

But even if it is assumed that Pertamina was

justified in waiting until August 2005 to discover the evidence now relied upon, what Pertamina did after that raises grave questions. Pertamina knew by then that recovery on the Arbitral Award would occur almost entirely by means of enforcement proceedings in the United States. Sufficient funds had been restrained in New York City, under process of the Southern District of New York, to provide over $300 million to pay the amount of the Arbitral Award plus interest. Although it was too late by August 2005 to file a motion under Rule 60(b)(3) to set aside the judgment of the district court in Texas, it was open to Pertamina to attempt an "independent action" under Rule 60(b). This would have been a direct and straightforward method to determine whether there was a right to overturn, on grounds of fraud, the Arbitral Award and the judgment based thereon.

However, Pertamina did no such thing. What it did was to raise its alleged fraud claim in Hong Kong and Singapore by way of defense against enforcement actions brought by KBC in those locations. But Hong Kong and Singapore had virtually no significance in the KBC-Pertamina contest. As it turned out only 3/10 of 1% of the judgment debt was collected in Hong Kong, and nothing in Singapore. Almost the entire judgment debt (99 7/10%) was paid from funds restrained in the federal court in New York, in proceedings based on the judgment of the federal court in Texas. Yet Pertamina made no move to submit the fraud claim to any court in the United States.

As is now known, Pertamina developed a different strategy to prevent collection of the 99 7/10% in the

United States. After 2 1/2 years of hard-fought litigation in the Southern District, a judgment was entered in that court on October 22, 2004, which would allow collection of the amount due of over $300 million. The Second Circuit affirmed the judgment on March 9, 2006. Pertamina then applied to the Supreme Court for certiorari. A decision on this certiorari petition was expected in early October 2006. The likelihood of the Supreme Court granting the petition was admittedly small.

At this point it appeared that the litigation between KBC and Pertamina was at long last about to be concluded. There was no indication of any remaining issues to be resolved, except in the unlikely event that the Supreme Court would review proceedings which had taken place in the Southern District of New York and the Second Circuit. However, in an attempt to head off possible further problems, the Court, in August 2006, asked counsel for Pertamina whether there would be any further issue which might come up following the likely denial of certiorari by the Supreme Court. On August 28, 2006 the attorney for Pertamina wrote the Court basically assuring the Court that a denial of certiorari by the Supreme Court would be the end, and specifically stating that Pertamina did not object to payment of the judgment.

Counsel for Pertamina has stated to this Court that he did not know, when he wrote that letter, that Pertamina planned to file the action in the Cayman Islands. But, of course, Pertamina knew. It deliberately concealed its plan from this Court and deliberately failed to have its attorney disclose that

plan in the August 28 letter. No other conclusion is possible.

A little over two weeks later, on September 15, 2006, Pertamina commenced the action in the Cayman Islands. Shortly thereafter, as expected, the Supreme Court denied Pertamina's certiorari petition.

It is significant that, on December 31, 2003, Alfred Rohimone, Pertamina's Finance Director, told the prominent Indonesian newspaper Komas that the arbitration decision could no longer be disputed, but that "what Pertamina is doing now is actually only buying time." Pertamina's tactics in the Cayman Islands action are completely consistent with "buying time." Even under Pertamina's own version, it knew of the so-called new evidence of fraud by late 2005. But it made no use of that evidence in a timely action in the United States where such an action would naturally have been brought if Pertamina had sought to litigate in a fair and direct fashion. Indeed, no timely action was brought even in the Cayman Islands. Instead, Pertamina held back, waiting until the very last moment before the litigation was to be terminated. It concealed its strategy from this Court in response to a direct inquiry, and then filed an action in a foreign court.

By suing in the Cayman Islands, Pertamina is not merely seeking a judgment in a foreign court with consequences in the foreign venue. The main objective of Pertamina is to have the Cayman Islands court reach out to the United States and frustrate the consummation of the long and difficult litigation

in the United States. It is true that KBC is a Cayman Islands limited liability company. But the court actions which have resulted in the recovery of $319 million by KBC, have occurred in the United States. Pertamina is seeking to have the Cayman Islands court enter orders preventing the completion and consummation of this United States litigation.

Pertamina takes the position that it is not seeking, through the Cayman Islands action, to interfere in any way with the jurisdiction or the processes of the American courts. According to Pertamina, since those processes have now been completed with final judgments and full payment to KBC of the judgment debt, no interference with or harm to the American proceedings can occur by merely having the Cayman Islands court prohibit KBC from disposing of the $263 million still in KBC's hands. This is the argument made by counsel for Pertamina at the September 26, 2006 hearing (Minutes pp. 20 et seq.). Counsel went on to urge that what is being pursued in the Cayman Islands is a "new claim based on new matter," and that Pertamina is merely asking the court to do something which is "an every day event" in courts-that is, to secure possible future judgments by an injunction or an attachment or a garnishment (Minutes pp. 24-25).

The problems with these theories are numerous. In the first place, the Cayman Islands action is not a new action in the sense of raising new issues unrelated to the United States proceedings. As pointed out earlier in this opinion, the entire premise of the Cayman Islands action is that the Arbitral

Award should be nullified, and that all proceedings to enforce that award should be stopped. Of course, by the time the Cayman Islands action was brought, the proceedings in the United States to enforce the Arbitral Award had been virtually completed. But Pertamina's pleadings in that action requested that all enforcement proceedings be halted by the Cayman Islands court. What that means, from a practical standpoint, is that the Cayman Islands court should take steps to stop whatever it is possible to stop in the way of enforcement proceedings. Moreover, there can be no doubt that the overall purpose of the Cayman Islands action is to cancel out what KBC has achieved in the United States courts by way of enforcement of the Arbitral Award. This is surely made clear by the fact that the "damages" sought in the Cayman Islands would, under the clear definition in the pleadings there, amount to the very same $319 million, which has been awarded to KBC in the United States.

It is now necessary to deal with the argument of Pertamina that this Court should not be concerned about any effect on the American judicial process because the judgments have been entered, KBC has been paid, and that is the end of the matter as far as the jurisdiction and interest of the federal courts in the United States are concerned. This Court disagrees. To explain this disagreement, certain obvious propositions must be stated. A federal court in Texas has determined that KBC is entitled to be paid the amount of the Arbitral Award plus interest. This means that, as far as the litigation between KBC and Pertamina regarding the Arbitral Award is concerned, KBC is entitled to receive the money, to

own the money, and to dispose of that money as it sees fit. The litigation in the Southern District of New York determined that certain funds of Pertamina, located in New York banks, can be used to pay the judgment debt to KBC. Again, the premise of the proceedings in New York has been that, as far as the issues between KBC and Pertamina about the Arbitral Award are concerned, KBC is entitled to have the funds turned over to it, is entitled to own those funds, and is entitled to dispose of those funds as it sees fit. The judgments referred to above are not conditional, or qualified, or limited in any way as to KBC's rights with respect to the monies awarded.

On the other hand, it is obvious that when a judgment creditor receives money awarded by a judgment, there may be many reasons why that money might be attached or might be subject to some lien or some question of title. A judgment creditor might be subject to other lawsuits or other claims of various kinds, independent of the lawsuit in which the judgment was entered.

But, if the judgment debtor is seeking to tie up the proceeds of the judgment in an action to vacate or overturn the judgment, as this Court has found that Pertamina is attempting to do, then there are definite rules about when, and under what conditions, this can be done. And courts are surely not hospitable to subterfuge designed to avoid applicable rules. For instance, if a judgment debtor files something called an action for damages against the judgment creditor, and seeks damages in the precise amount of the judgment, our courts would undoubtedly not allow this strategy as a means for

evading the rules relating to proper grounds for setting aside judgments. The Cayman Islands action brought by Pertamina is exactly the kind of action just spoken of.

This Court does not accept the proposition that, under these circumstances, it has no legitimate interest in the matter and no power to protect KBC from abusive litigation, even in a foreign court. This Court believes that Pertamina's attempt to use the injunctive powers of the Cayman Islands court would, if successful, truly interfere with the jurisdiction of the federal courts in the United States. Such jurisdiction surely embraces the sanctity and finality of judgments and the rights obtained under those judgments. For reasons already indicated, it is no answer to this to say that the only thing sought is a remedy against KBC's disposition of the funds, rather than a remedy against some ongoing court process. If KBC cannot have full ownership rights to the money, including the right to pay it to the owners of KBC, then all of the process leading up to the award of the money to KBC has been in vain.

This Court has the power, and indeed the duty, to deal with abusive litigation tactics used by a party before it. In the present case the salient fact is that, after almost six years of litigation in district and appellate courts based on the Arbitral Award, the American courts had finally resolved all the issues presented to them about whether the Arbitral Award should be confirmed and about the method by which KBC should recover the large amount due.

Although procedures were available under

federal law for Pertamina to make its claim of fraud and to seek to prevent KBC from recovering the $319 million, there was no attempt whatever by Pertamina to make use of such procedures. Instead, Pertamina engaged in the six years of litigation in the United States without any mention of its claim of fraud. Finally, at the very moment when the litigation was to be legitimately ended, Pertamina brought the action in the Cayman Islands after engaging in literal subterfuge in dealing with the Court in New York. The purpose of this lawsuit is to effectively wipe out the effect of the United States judgments and to do this with as great an amount of delay as possible.

Conclusion

Under all the circumstances, the Court grants KBC's motion in the following manner. At the very least, KBC is entitled to an injunction prohibiting Pertamina from applying to the Cayman Islands court or any other court for any order restricting KBC in the use or disposition of funds awarded to it pursuant to the judgments. Beyond this, the Court believes that the record justifies an injunction entirely prohibiting Pertamina from pursuing the Cayman Islands action or any similar action in any court, because KBC is entitled to be protected against litigation designed to delay the completion of this lengthy court contest.

In its notice of motion, KBC requests that the Court grant "such other and further relief as the Court deems just and proper." The Court deems it just and proper to accompany the injunction with a

declaratory judgment. The nature of the declaratory judgment follows inevitably from what has been decided in this opinion. Therefore the Court will issue a declaratory judgment declaring that the funds recovered by KBC pursuant to the judgments in this matter are the property of KBC, that KBC has full right to dispose of such funds as KBC sees fit, and that, in the event that Pertamina should for some reason obtain an order of the Cayman Islands court or any other court, based upon matters relating to the Arbitral Award, purporting to interfere with KBC's rights to dispose of the funds, KBC has no obligation to comply with such order.

The parties will settle an Order and Judgment based on this opinion. When that Order and Judgment is signed by the Court, the Order of September 27, 2006, will be deemed vacated, as will the Memorandum of September 27, 2006 restricting KBC's ability to distribute funds. However, in connection with the settlement of the Order and Judgment based on this opinion, the Court will entertain an application for a stay pending appeal if any party wishes to make such an application.

SO ORDERED.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

KARAHA BODAS CO., L.L.C.,
Plaintiff-Appellee,

v.

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA; ET AL., *Defendants,*

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA,
Defendant-Appellant.

Nos. 02-20042, 03-20602

March 23, 2004

William A. Isaacson (argued), Jonathan D. Schiller, Carl John Nichols, Philip Michael Spector, Alison E. Peck, Boies, Schiller & Flexner, Christopher F. Dugan, Paul, Hastings, Janofsky & Walker, Washington, DC, Kenneth Stuart Marks, Susman Godfrey, Emil T. Bayko, Jones Day, Houston, TX, for Plaintiff-Appellee.

Matthew D. Slater (argued), Cleary, Gottlieb, Steen & Hamilton, Washington, DC, F. Walter Conrad, Jr., Michael L. Brem, Baker Botts, Houston, TX, for

Defendant-Appellant.

Carolyn B. Lamm, White & Case, Washington, DC, John E. O'Neill, Jesse R. Pierce, Clements, O'Neill, Pierce, Wilson & Fulkerson, Houston, TX, for Republic of Indonesia, Amicus Curiae.

Appeal from the United States District Court for the Southern District of Texas.

Before KING, Chief Judge, DAVIS, Circuit Judge, and ROSENTHAL*, District Judge.

ROSENTHAL, District Judge:

Thirty years ago, the United States Supreme Court recognized that "[a] contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is ... an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.... Such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved."[1] When, as here, parties to international commercial contracts agree to arbitrate future disputes in a neutral forum, orderliness and predictability also depend on the procedures for reviewing and enforcing arbitral

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* District Judge of the Southern District of Texas, sitting by designation.

1 *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974).

awards that may result. This appeal arises from an arbitral award (the "Award") made in Geneva, Switzerland, involving contracts negotiated and allegedly breached in Indonesia. The Award imposed liability and damages against Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina"), which is owned by the government of Indonesia, in favor of Karaha Bodas Company, L.L.C. ("KBC"), a Cayman Islands company. KBC filed this suit in the federal district court in Texas to enforce the Award under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), and filed enforcement actions in Hong Kong and Canada as well.[2] While those enforcement proceedings were pending, Pertamina appealed the Award in the Swiss courts, seeking annulment. When that effort failed, and after the Texas district court granted summary judgment enforcing the Award, Pertamina obtained an order from an Indonesian court annulling the Award.[3]

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[2] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (entered into force with respect to the United States, Dec. 29, 1970), *codified at* 9 U.S.C. § 201 *et seq.*

[3] A different panel of this court heard a separate appeal from the district court's injunction against Pertamina's prosecution of the action in Indonesia, but did not decide the effect of the Indonesian court's annulment order on the enforcement proceeding. *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* 335 F.3d 357, 373-74 (5th Cir.2003). One of the issues before this panel is whether the Indonesian court's order is a defense to the enforcement of the Award.

Pertamina appealed to this court. During the appeal, Pertamina filed in the district court a motion to set aside the judgment under Federal Rule of Civil Procedure 60(b)(2), based on newly-discovered evidence Pertamina contended should have been disclosed during the arbitration, and under Rule 60(b)(5), based on the Indonesian court's decision annulling the arbitration Award. This court remanded to the district court for consideration of Pertamina's Rule 60(b) motion.[4] On remand, the district court denied Pertamina's Rule 60(b) motion. This appeal consolidates Pertamina's challenges to the grant of summary judgment and to the denial of the Rule 60(b) motion.

Pertamina urges this court to reverse the district court's decision enforcing the Award on several grounds under the New York Convention. We conclude that the record forecloses Pertamina's arguments that procedural violations and other errors occurred during the arbitration preclude enforcement. We reject Pertamina's argument that the Indonesian court's order annulling the Award bars its enforcement under the New York Convention; this argument is inconsistent with the arbitration agreements Pertamina signed and with its earlier position that Switzerland, the neutral forum the parties selected, had exclusive jurisdiction over an annulment proceeding. We reject Pertamina's efforts to delay or avoid enforcement of the Award as evidencing a disregard for the

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[4] *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 2003 WL 21027134, at *4-6 (5th Cir. March 5, 2003).

international commercial arbitration procedures it agreed to follow.[5] In short, we affirm the district court's judgment enforcing the Award, for the reasons set out in detail below.

I. Background

A. Procedural and Factual History

KBC explores and develops geothermal energy sources and builds electric generating stations using geothermal sources. Pertamina is an oil, gas, and geothermal energy company owned by the Republic of Indonesia.[6] In November 1994, KBC signed two contracts to produce electricity from geothermal sources in Indonesia. Under the Joint Operation Contract ("JOC"), KBC had the right to develop geothermal energy sources in the Karaha area of Indonesia; Pertamina was to manage the project and receive the electricity generated. Under the Energy Sales Contract ("ESC"), PLN agreed to purchase from Pertamina the energy generated by KBC's facilities. Both contracts contained almost identical broad arbitration clauses, requiring the parties to arbitrate any disputes in Geneva, Switzerland under the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL").[7]

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[5] We note that the length of this opinion reflects the number of arguments Pertamina raises to evade its obligations under the Award more than the strength of those arguments.

[6] PLN, an electric utility owned by the government of Indonesia, was a party to the arbitration but was dismissed from the district court action.

[7] Article 13.2(a) of the arbitration provision of the JOC provided:

> If the Dispute cannot be settled within thirty (30) working days by mutual discussions as contemplated by Article 13.1 hereof, the Dispute shall finally be settled by an arbitral tribunal (the "Tribunal") under the UNCITRAL arbitration rules.... Each Party will appoint an arbitrator within thirty (30) days after the date of a request to initiate arbitration, who will then jointly appoint a third arbitrator within thirty (30) days of the date of the appointment of the second arbitrator, to act as Chairman of the Tribunal. Arbitrators not appointed within the time limits set forth in the preceding sentence shall be appointed by the Secretary General of the International Center for Settlement of Investment Disputes. Both Parties undertake to implement the arbitration award. The site of the arbitration shall be Geneva, Switzerland. The language of the arbitration shall be English. The Parties expressly agree to waive [certain Indonesian procedural laws]....

JOC, Art. 13.2(a),(d). Section 8.2(a) of the ESC's arbitration provision similarly read:

> If the Dispute cannot be settled within forty-five calendar (45) days by mutual discussions as contemplated by Section 8.1 hereof, the Dispute shall finally be settled by an arbitral tribunal (the "Tribunal") under the UNCITRAL arbitration rules.... PLN on one hand, and [KBC] and PERTAMINA on the other hand, will each appoint one arbitrator, in each case within thirty (30) days after the date of a request to initiate arbitration, who will then jointly appoint a third arbitrator within thirty (30) days of the date of the appointment of the second arbitrator, to act as Chairman of the Tribunal. Arbitrators not appointed within the time limits set forth in the preceding sentence shall be appointed by the Secretary General of the International Center for Settlement of Investment Disputes, upon the request of any Party. All Parties undertake to implement the arbitration award. The site of the arbitration shall be Geneva, Switzerland. The language of the arbitration shall be English. The Parties expressly agree to waive the applicability of [certain

On September 20, 1997, the government of Indonesia temporarily suspended the project because of the country's financial crisis. The government of Indonesia indefinitely suspended the project on January 10, 1998. On February 10, 1998, KBC notified Pertamina and PLN that the government's indefinite suspension constituted an event of "force majeure" under the contracts. KBC initiated arbitration proceedings on April 30, 1998. In its notice of arbitration, KBC appointed Professor Piero Bernardini, vice-chair of the International Chamber of Commerce's ("ICC") International Court of Arbitration and member of the London Court of International Arbitration, to serve as an arbitrator.

Indonesian procedural laws]....

Both contracts contained the following additional arbitration language:

> The award rendered in any arbitration commenced hereunder shall be final and binding upon the Parties and judgment thereon may be entered in any court having jurisdiction for its enforcement. The Parties hereby renounce their right to appeal from the decision of the arbitral panel and agree that in accordance with Section 641 of the Indonesian Code of Civil Procedure [neither] Party shall appeal to any court from the decision of the arbitral panel and accordingly the Parties hereby waive the applicability of [certain Indonesian laws]. In addition, the Parties agree that [neither] Party shall have any right to commence or maintain any suit or legal proceeding concerning a [dispute hereunder until the] dispute has been determined in accordance with the arbitration procedure provided for herein and then only to enforce or facilitate the execution of the award rendered in such arbitration.

JOC, Art. 13.2(d); ESC, § 8.2(d).

Pertamina, however, did not designate an arbitrator in the contractually allotted thirty days. The JOC and ESC both provided that if a party failed to appoint an arbitrator within thirty days, the Secretary-General of the International Center for Settlement of Investment Disputes ("ICSID") was to make the appointment. After notifying Pertamina, PLN, and the government of Indonesia, the ICSID appointed Dr. Ahmed El-Kosheri, another vice-chair of the ICC, as the second arbitrator. As specified in the JOC and ESC, the two appointed arbitrators then selected the chairman of the arbitration panel, Yves Derains, the former Secretary-General of the ICC.

Pertamina raised threshold challenges to the Tribunal's consolidation of the claims KBC raised under the JOC and the ESC into one arbitration proceeding and to the selection of the panel. In October 1999, the Tribunal issued a Preliminary Award, rejecting Pertamina's threshold challenges and ruling that the government of Indonesia was not a party to the contracts or to the arbitration proceeding.

KBC filed its Revised Statement of Claim in November 1999. Pertamina received a number of extensions before it filed its reply to the Revised Statement of Claim in April 2000. KBC filed a rebuttal to that reply in May 2000. In response to KBC's rebuttal, Pertamina sought additional discovery and a continuance of the proceedings, claiming that KBC had raised assertions and added elements to its case-in-chief not contained in the Revised Statement of Claim.

From the outset, the parties vigorously disputed whether KBC could have obtained financing to build the project if the government of Indonesia had not issued the suspension decree. Pertamina contended that KBC could not have built the project-and therefore suffered no damages from the government decree suspending the work-because the precarious situation in Indonesia effectively made the necessary financing unavailable. Pertamina asserted that KBC's rebuttal introduced a new theory as to how project financing could have been obtained. KBC changed from focusing on the availability of third-party financing and argued in the rebuttal that one of its direct investors, FPL Energy ("FPL"), would have provided project financing if no other source was available. Shortly before the scheduled hearing, Pertamina sought discovery of documents relating to FPL's asserted willingness to finance the project. In May 2000, the Tribunal denied Pertamina's request to obtain this discovery before the hearing and denied the request for a continuance. The Tribunal stated that it would decide at the conclusion of the hearing "whether any adjustment to the proceeding" would be required because of the discovery requested. The hearing on the merits proceeded as scheduled in June 2000.

The Tribunal received a large record. Both sides submitted extensive witness statements, expert reports, exhibits, and briefs. During the hearing, Pertamina and PLN cross-examined KBC's witnesses, including two witnesses who testified about KBC's ability to finance the project, Robert McGrath, Treasurer of FPL Group, Inc., and Leslie

Gelber, former Vice-President of Development at FPL Energy. Both witnesses submitted declarations stating that "FPL Energy was prepared in 1998 to provide bridge financing or direct capital to continue the Project through the phases of the Project that were scheduled to be completed during Indonesia's period of instability." At the hearing, counsel for Pertamina specifically questioned McGrath about the availability of project financing from FPL. During that questioning, a Tribunal member asked McGrath whether the investment in the project was protected by a form of political risk insurance. McGrath responded, "I am not sure of that. I know there were some discussions at the time, but I don't recollect as to whether it was or wasn't." Counsel for Pertamina asked no follow-up questions. At the end of the hearing, counsel for Pertamina declined to pursue the previously requested discovery and stated that the record had been "fully" made.

In the Final Award, the Tribunal found that under the JOC and the ESC, Pertamina and PLN had accepted the risk of loss arising from a "Government Related Event." The Tribunal interpreted the contracts as "putting the consequences of a Governmental decision which prevents the performance of the contract at Pertamina's ... sole risk." The Tribunal awarded KBC $111.1 million, the amount KBC had expended on the project, and $150 million in lost profits. The Tribunal explained in detail why it rejected the lost profits amount KBC sought-$512.5 million-and how it arrived at the amount awarded.

In February 2001, Pertamina appealed the Award

to the Supreme Court of Switzerland. While that appeal was pending, KBC initiated this suit in the federal district court to enforce the Award.

B. The District Court Decisions

Pertamina challenged enforcement of the Award in the federal district court on four grounds under Article V of the New York Convention: (1) the procedure for selecting the arbitrators was not in accordance with the agreement of the parties; (2) the Tribunal improperly consolidated the claims into one arbitration; (3) Pertamina was "unable to present its case" to the Tribunal; and (4) enforcement of the damages Award would violate the public policy of the United States. As to the first two grounds, Pertamina contended that the decision to consolidate the claims under the two contracts was procedurally improper and that KBC's unilateral appointment of an arbitrator violated the ESC arbitration provision. As to the third ground, Pertamina argued that the Tribunal improperly reversed its finding in the Preliminary Award that Pertamina did not breach the contracts by holding Pertamina liable for nonperformance in the Final Award; that the Tribunal's denial of Pertamina's request for discovery of FPL's records prevented Pertamina from fully presenting its case; and that the Tribunal's denial of a continuance after KBC filed its rebuttal to the reply to the Revised Statement of Claim prevented Pertamina from fully preparing to meet KBC's contentions. As to the fourth ground, Pertamina argued that the Award violated the international abuse of rights doctrine and punished Pertamina for obeying the Indonesian government's decree. Under

Federal Rule of Civil Procedure 56(f), Pertamina requested a delay in the district court in responding to KBC's summary judgment motion to seek discovery of the same FPL records it had unsuccessfully sought in the arbitration.

Pertamina continued its appeal seeking annulment of the Award to the Supreme Court of Switzerland while the enforcement action was pending in the district court in Texas. The Texas district court slowed the proceedings in deference to Pertamina's request that the Swiss court first be allowed to decide whether to annul the Award. In April 2001, the Swiss Supreme Court dismissed Pertamina's claim because of untimely payment of costs. Pertamina moved for reconsideration; the Swiss court denied that motion in August 2001.

In December 2001, the district court enforced the Award, rejecting each of Pertamina's grounds for refusal. The district court carefully reviewed the record in examining Pertamina's claimed inability to challenge in the arbitration proceeding KBC's argument that it could have obtained project financing from its investor, FPL. The district court denied Pertamina's Rule 56(f) request for additional discovery on this issue. Pertamina filed its notice of appeal from the district court's summary judgment enforcing the Award in January 2002.

Having failed in its effort to annul the Award in the Swiss courts, Pertamina filed suit in Indonesia seeking annulment. In August 2002, an Indonesian court annulled the Award. KBC continued with enforcement suits in Hong Kong and Canada. In

October 2002, while this appeal was pending, Pertamina discovered in the Canadian proceeding that FPL and one other KBC investor, Caithness, had held a political risk insurance policy covering the KBC project through Lloyd's of London. Pertamina also learned that Lloyd's had paid $75 million under that insurance policy to FPL and Caithness for the losses resulting from the Indonesian government's suspension of the project.

In December 2002, Pertamina filed a motion in the district court to vacate the judgment on three grounds: (1) newly-discovered evidence of the political risk insurance policy, under Rule 60(b)(2); (2) the Indonesian court's annulment of the underlying arbitral Award, under Rule 60(b)(5); and (3) satisfaction of judgment to the extent of the $75 million insurance payment. Pertamina also filed a motion in this court to supplement the record and briefing. In both motions, Pertamina argued that the existence of political risk insurance coverage in favor of FPL undermined KBC's claims that the contracts allocated political risks to Pertamina and that FPL would have financed the project in order to avoid losing its earlier investment. Additionally, Pertamina argued that the payment of the insurance proceeds undermined the Tribunal's determination of damages. Pertamina urged that KBC's failure to disclose the insurance during the arbitration provided a basis for refusing to enforce the Award and made the district court's summary judgment improper.

This court denied Pertamina's motion to supplement the appellate record under Federal Rule

of Appellate Procedure 10(c) and remanded to the district court for consideration of Pertamina's Rule 60(b) motion. On remand, the district court denied the motion, finding that Pertamina failed to show that KBC had misled the tribunal or that KBC's failure to produce the political risk insurance policy violated the rules governing the arbitration.

The district court also rejected Pertamina's claim that Indonesia had primary jurisdiction to decide to annul the Award and declined to give effect to the Indonesian court's annulment order as a defense to enforcement. The district court imposed judicial estoppel to preclude Pertamina from asserting that Indonesian procedural law had governed the arbitration and that Indonesian courts had primary jurisdiction to review the Award. Finally, the district court rejected Pertamina's argument that the amount of the Award should be offset by the $75 million insurance payment.[8]

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[8] The day after the district court issued its final order denying Pertamina's Rule 60(b) motion, KBC submitted a letter to the court "clarifying" that while FPL was not the insured under the political risk insurance policy, FPL owned one of the named insureds that benefitted under the policy. The district court issued a supplemental order acknowledging KBC's letter and noting that the fact that FPL was not a named insured under the insurance policy "was only one of many factors that the Court considered in denying Pertamina's Rule 60(b) Motion. Thus, the fact that an entity owned by FPL, but not FPL itself, benefit[t]ed under the policy does not change any legal conclusion" in the court's decision. On the same day that the district court issued its supplemental order, and ten days after the court's denial of Pertamina's Rule 60(b) motion, KBC filed a Motion to Amend Findings of Fact under Federal Rule of Civil Procedure 52(b). In a second supplemental order, the district court recognized KBC's motion as a Motion to Amend or Alter

This appeal followed. Pertamina argues that the Tribunal improperly consolidated the claims into one arbitration proceeding; the selection of the arbitrators violated the JOC and ESC; the Tribunal denied Pertamina a fair opportunity to present its case because the Tribunal reversed part of its Preliminary Award without notice, denied Pertamina's request to postpone the arbitration, and denied Pertamina's discovery requests; the Award is contrary to public policy because it violated the international law abuse of rights doctrine and because the district court's decision holds Pertamina liable for complying with Indonesian law; and the Indonesian court's annulment of the arbitral Award is a defense to enforcement under the New York Convention. Each ground is addressed below.

II. Analysis

A district court's decision confirming an arbitration award is reviewed under the same standard as any other district court decision.[9] This court reviews a district court's grant of summary

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Judgment under Federal Rule of Civil Procedure 59(e) and granted the motion. The court assumed, without deciding, that FPL benefitted from the risk insurance policy, but held that it did not affect the basis of the court's decision. Pertamina argues that the district court did not have jurisdiction to issue either of these two supplemental orders. This court agrees that the issue addressed in the supplemental orders does not affect the outcome of this case.

[9] *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947-948, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995); *Hughes Training, Inc. v. Cook*, 254 F.3d 588, 592 (5th Cir.2001).

judgment *de novo.*[10]

A. The New York Convention

The New York Convention provides a carefully structured framework for the review and enforcement of international arbitral awards. Only a court in a country with primary jurisdiction over an arbitral award may annul that award.[11] Courts in other countries have secondary jurisdiction; a court in a country with secondary jurisdiction is limited to deciding whether the award may be enforced in that country.[12] The Convention "mandates very different regimes for the review of arbitral awards (1) in the [countries] in which, or under the law of which, the award was made, and (2) in other [countries] where recognition and enforcement are sought."[13] Under the Convention, "the country in which, or under the [arbitration] law of which, [an] award was made" is said to have primary jurisdiction over the arbitration award.[14] All other signatory states are secondary jurisdictions, in which parties can only contest whether that state should enforce the arbitral award.[15] It is clear that the district court had secondary jurisdiction and considered only whether

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10 *Eason v. Thaler,* 73 F.3d 1322, 1324 (5th Cir.1996).

11 *Karaha Bodas Co.,* 335 F.3d at 364;*see Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.,* 126 F.3d 15, 23 (2d Cir.1997).

12 *Karaha Bodas Co.,* 335 F.3d at 364.

13 *Alghanim,* 126 F.3d at 23 (quoted in *Karaha Bodas Co.,* 335 F.3d at 364).

14 *Karaha Bodas Co.,* 335 F.3d at 364.

15 *Id.*

to enforce the Award in the United States.

Article V enumerates specific grounds on which a court with secondary jurisdiction may refuse enforcement.[16] In contrast to the limited authority of

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[16] Article V, Section 201 of the New York Convention provides:

> *1.* Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> *(a)* The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
>
> *(b)* The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
>
> *(c)* The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
>
> *(d)* The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
>
> *(e)* The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under

secondary-jurisdiction courts to review an arbitral award, courts of primary jurisdiction, usually the courts of the country of the arbitral situs, have much broader discretion to set aside an award. While courts of a primary jurisdiction country may apply their own domestic law in evaluating a request to annul or set aside an arbitral award, courts in countries of secondary jurisdiction may refuse enforcement only on the grounds specified in Article V.[17]

The New York Convention and the implementing legislation, Chapter 2 of the Federal Arbitration Act ("FAA"), provide that a secondary jurisdiction court must enforce an arbitration award unless it finds one of the grounds for refusal or deferral of recognition or enforcement specified in the Convention.[18] The court may not refuse to enforce an arbitral award solely on

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> the law of which, that award was made.
>
> 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
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> *(a)* The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
>
> *(b)* The recognition or enforcement of the award would be contrary to the public policy of that country.

9 U.S.C. § 201, Art. V(1)-(2). *See generally Alghanim*, 126 F.3d at 23; Susan Choi, *Judicial Enforcement of Arbitration Awards Under the ICSID and New York Conventions*, 28 N.Y.U. J. Int'l L. & Pol. 175 (1996).

[17] *Alghanim*, 126 F.3d at 23 (cited in *Karaha Bodas Co.*, 335 F.3d at 368).

[18] 9 U.S.C. § 207.

the ground that the arbitrator may have made a mistake of law or fact.[19] "Absent extraordinary circumstances, a confirming court is not to reconsider an arbitrator's findings."[20] The party defending against enforcement of the arbitral award bears the burden of proof.[21] Defenses to enforcement under the New York Convention are construed narrowly, "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts...."[22]

B. The Choice-of-Law Issues

In the JOC and ESC, the parties stipulated that "the site of the arbitration shall be Geneva." The Tribunal concluded that under the arbitration agreements, Swiss procedural law applied as the law of the arbitral forum.[23] From 1998 to April 2002,

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[19] *Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 315 (2d Cir.1998); *Nat'l Wrecking Co. v. Int'l Bhd. of Teamsters*, 990 F.2d 957, 960 (7th Cir.1993).

[20] *Europcar Italia*, 156 F.3d at 315.

[21] *Imperial Ethiopian Gov't v. Baruch-Foster Corp.*, 535 F.2d 334, 336 (5th Cir.1976); *see Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d 1286, 1292 n. 3 (11th Cir.2004).

[22] *Imperial Ethiopian Gov't*, 535 F.2d at 335; *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L'Industrie du Papier*, 508 F.2d 969, 974, 976 (2d Cir.1974).

[23] The Tribunal specifically cited Swiss procedural law in its Preliminary Award. The Tribunal first cited Swiss law regarding the intentions of parties to a contract to help guide its determination whether the government of Indonesia was a party to the JOC and ESC. The Tribunal cited the Swiss concept of "connexity" in concluding that KBC could consolidate its claims under the contracts into a single arbitration proceeding. Finally, the Tribunal referred to Swiss common law

Pertamina consistently and repeatedly took the position before the Tribunal, the Swiss courts, and the United States district court, that Swiss procedural law applied to the arbitration.[24] In April

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suggesting that arbitrators are not agents in determining that the selection of Tribunal arbitrators was appropriate under the agreements. The Final Award stated that it was "[m]ade in Geneva."

[24] *See, e.g.*, Prelim. Award, § B(1) ("The Respondents support this conclusion by making reference to Swiss law as the JOC and the ESC provide for UNCITRAL Arbitration in Geneva between the parties which are neither Swiss nor Swiss resident. As a result, and under both contracts, the arbitration proceedings are governed by Chapter 12 of the Swiss Private International Law Statutes. Under Swiss law, [Respondent contends] the Arbitral Tribunal is lacking jurisdiction because KBC failed to comply with the contractual prerequisites to arbitration."); *id.* at § C(1) ("The Respondents also state that, under the arbitration agreements and Swiss law, the arbitrators have no power to consolidate ...."); *id.* at § C(3) (citing a Swiss federal tribunal case in support of its decision that a consolidated arbitration was appropriate); *id.* at § D(1) (Respondents contend that "[s]uch solution is not acceptable under the applicable Swiss law").

The district court found that Pertamina "specifically, repeatedly and unequivocally" argued that Swiss arbitration law applied in the arbitration. Pertamina opened its motion to stay the district court proceedings pending appeal to the Swiss judiciary by stating: "The arbitration award ... was conducted subject to the arbitration laws of Switzerland, and the Swiss court is empowered to vacate an award rendered in Switzerland.... KBC is asking this Court to act prematurely to confirm an award that might be overturned in the country whose law governed the arbitration." Pertamina added that "it is fundamental that the courts of the originating nation are in the best position to pass on issues under their own law.... Here, Pertamina's appeal encompasses questions of Swiss law." Pertamina made similar arguments under Swiss procedural law in its responses to KBC's motion for summary judgment.

2002, after the Swiss court had rejected Pertamina's annulment proceeding and the district court had held the Award enforceable in the United States, Pertamina moved in the district court for a stay of the Award pending the outcome of the annulment proceeding Pertamina had filed in Indonesia. For the first time, Pertamina raised in the district court the argument that Indonesian, not Swiss, procedural law had applied to the arbitration. Pertamina took this position in the district court as part of its argument that Indonesia had primary jurisdiction over the Award and therefore had the authority to set it aside rather than merely decline to enforce it.

Article V(1)(e) of the Convention provides that a court of secondary jurisdiction may refuse to enforce an arbitral award if it "has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."[25] Courts have held that the language, " 'the competent authority of the country ... under the law of which, that award was made' refers exclusively to procedural and not substantive law, and more precisely, to the regimen or scheme of arbitral procedural law under which the arbitration was conducted, and not the substantive law ... applied in the case."[26] In this appeal, Pertamina and the Republic of Indonesia (the "Republic"), as amicus, argue that the Tribunal and the district court erred

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[25] 9 U.S.C. § 201, Art. V(1)(e).

[26] *Int'l Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera, Indus. Y Comercial,* 745 F.Supp. 172, 178 (S.D.N.Y.1990); *see Alghanim,* 126 F.3d at 21; *M & C Corp. v. Erwin Behr GmbH & Co., KG,* 87 F.3d 844, 848 (6th Cir.1996).

in finding that Swiss procedural law, rather than Indonesian procedural law, applied. Pertamina and the Republic argue that in the arbitration agreements, the parties chose Indonesian procedural, as well as substantive, law to govern the arbitration. Pertamina and the Republic assert that, as a result: (1) the arbitration must be examined for compliance with Indonesian procedural law; and (2) the Indonesian court had primary jurisdiction to annul the Award, providing a defense to enforcement in the United States. KBC responds that the Tribunal properly interpreted the parties' contracts in deciding that Swiss procedural law applied and the district court properly applied the New York Convention in affirming that decision. This court agrees with KBC.

Under the New York Convention, the rulings of the Tribunal interpreting the parties' contract are entitled to deference.[27] Unless the Tribunal manifestly disregarded the parties' agreement or the law, there is no basis to set aside the determination that Swiss procedural law applied.[28] The parties' arbitration agreements specified that the site of the arbitration was Geneva, Switzerland and that the arbitration would proceed under the UNCITRAL rules. Those rules specify that the "arbitral tribunal shall apply the law designated by the parties as

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[27] *Europcar Italia*, 156 F.3d at 315; *Nat'l Wrecking Co.*, 990 F.2d at 960; *see James Ford Inc. v. Ford Dealer Computer Serv. Inc.*, 56 Fed. Appx. 324, 325 (9th Cir.2003) (giving broad deference to an arbitrator's choice-of-law decision).

[28] *Europcar Italia*, 156 F.3d at 315; *Nat'l Wrecking Co.*, 990 F.2d at 960.

applicable to the substance of the dispute."[29] It is undisputed that the parties specified that Indonesian substantive law would apply.[30] It is also undisputed that the contracts specified the site of the arbitration as Switzerland. The contracts did not otherwise expressly identify the procedural law that would apply to the arbitration. The parties did refer to certain Indonesian Civil Procedure Rules in the contracts.[31] Pertamina and the Republic argue that

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[29] *UNCITRAL Arbitration Rules*, G.A. Res. 31/98, U.N. GAOR Comm'n Int'l Trade L., at Art. 33(1) (1976), http://www.uncitral.org/english/texts/arbitration/arb-rules.html.

[30] Article 20 of the JOC and Section 12.1 of the ESC each provided: "This Contract shall be governed by the laws and regulations of [the] Republic of Indonesia."

[31] Pertamina and the Republic rely on the following contractual provisions for their position:

> The parties expressly agree to waive the applicability of (a) Article 650.2 of the Indonesian Code of Civil Procedure so that the appointment of the arbitrators shall not terminate as of the sixth (6th) Month after the date(s) of their appointments and (b) the second sentence of Article 620.1 of the Indonesian Code of Civil Procedure so that the arbitration need not be completed within the specific time.

JOC at Art. 13.2(a); ESC at § 8.2(a).

> In accordance with Section 631 of the Indonesian Code of Civil Procedure, the Parties agree that the Tribunal need not be bound by strict rules of law where they consider the application thereof to particular matters to be inconsistent with the spirit of this Contract and the underlying intent of the Parties, and as to such matters their conclusion shall reflect their judgment of the correct interpretation of all relevant terms hereof and the correct and just enforcement of this Contract in accordance with such terms.

JOC at Art. 13.2(b); ESC at § 8.2(b).

these references evidence an intent that while Switzerland would be the place of the arbitration, Indonesian procedural law would apply as the *lex arbitri*.

Under the New York Convention, an agreement specifying the place of the arbitration creates a presumption that the procedural law of that place applies to the arbitration.[32] Authorities on international arbitration describe an agreement providing that one country will be the site of the arbitration but the proceedings will be held under

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> The parties hereby renounce their right to appeal from the decision of the arbitral panel and agree that in accordance with Section 641 of the Indonesian Code of Civil Procedure neither Party shall appeal to any court ... and accordingly the Parties hereby waive the applicability of Articles 15 and 108 of the Law No. 1 of 1950 and any other provision of Indonesian law and regulations that would otherwise give the right to appeal the decisions of the arbitral panel.

JOC at Art. 13.2(d); ESC at § 8.2(d).

[32] Albert Jan van den Berg, "The Application of the New York Convention by the Courts," *ICCA Congress Series No. 9* 25, 26 (Kluwer 1999); Sir Michael J. Mustill & Stewart C. Boyd, *The Law and Practice of Commercial Arbitration in England* 64 (Butterworths 2d ed.1989); Alain Hirsch, *The Place of the Arbitration and the* Lex Arbitri, 34 Arb. J. 43, 46 (1979); Alan Scott Rau, *The New York Convention in American Courts,* 7 Am. Rev. Int'l Arb. 213, 224 (1996). In their reports filed in the district court, recognized authorities on international arbitration retained by both Pertamina and KBC, including Albert Jan van den Berg, Sudargo Guatama, Alan Scott Rau, and Eric A. Schwartz, agreed that under the Convention, arbitration clauses designating the site of the arbitration presumptively designate that site as the source of the applicable procedural law.

the arbitration law of another country by terms such as "exceptional"; "almost unknown";[33] a "purely academic invention";[34] "almost never used in practice";[35] a possibility "more theoretical than real"; and a "once-in-a-blue-moon set of circumstances."[36] Commentators note that such an agreement would be complex, inconvenient, and inconsistent with the selection of a neutral forum as the arbitral forum.[37]

In the JOC and ESC, the parties expressly agreed that Switzerland would be the site for the arbitration. This agreement presumptively selected Swiss procedural law to apply to the arbitration. There is no express agreement in the JOC or ESC that Indonesia would be the country "under the law of which" the arbitration was to be conducted and the

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[33] Mustill and Boyd, *Commercial Arbitration* at 64.

[34] Van den Berg, The Application of the New York Convention at 26.

[35] *Id.*

[36] Martin Hunter, *Case and Comment: International Arbitration,* [1988] Lloyd's Mar. & Comm. L.Q. 23, 26.

[37] *See, e.g.,* Gary B. Born, *International Commercial Arbitration: Commentary and Materials* 761 (2d ed.2001). Few reported cases involve arbitration clauses that separate the law of the forum state and the *lex arbitri.* In two such English cases, *Naviera Amazonica Peruana S.A. v. Compania Internacional de Seguros del Peru,* [1988] 1 Lloyd's L. Rep. 116 (C.A.1987), and *Union of India v. McDonnell Douglas Corp.,* [1993] 2 Lloyd's Rep. 48 (Q.B.1992), the courts applied the presumption that the procedural law of the place specified as the forum for the arbitration would govern. *Naviera Amazonica Peruana,* [1988] 1 Lloyd's L. Rep. at 119; *Union of India,* [1993] 2 Lloyd's Rep. at 50. The Hong Kong court also relied upon this presumption in determining that Swiss procedural law governed the arbitration proceeding at issue in this case. *Hong Kong decision* at 7-8.

Award was to be made.[38] The Tribunal recognized the parties' selection of Switzerland by issuing the Award as "[m]ade in Geneva." In selecting Switzerland as the site of the arbitration, the parties were not choosing a physical place for the arbitration to occur, but rather the place where the award would be "made." Under Article 16(1) of the UNCITRAL rules, the "place" designated for an arbitration is the legal rather than physical location of the forum.[39] The arbitration proceeding in this case physically occurred in Paris, but the Award was "made in" Geneva, the place of the arbitration in the legal sense and the presumptive source of the applicable procedural law.[40]

The references in the contracts to certain Indonesian civil procedure rules do not rebut the strong presumption that Swiss procedural law applied to the arbitration.[41] These references fall far

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[38] 9 U.S.C. § 201, Art. V(1)(e).

[39] See Jacomijn J. van Hof, Commentary on the UNCITRAL Arbitral Rules: The Application by the Iran-U.S. Claims Tribunal 109-10 (Kluwer 1991); see also UNCITRAL Arbitration Rules at Art. 16(1). Rules 16(2) and (3) expressly permit proceedings to be conducted at a location different from the designated "place" of the arbitration. UNCITRAL Arbitration Rules at Art. 16(2)-(3). Rule 16(4) provides that "[t]he award shall be made at the place of arbitration." Id. at Art. 16(4).

[40] Van Hof, *Commentary on the UNCITRAL Arbitral Rules* at 109-110.

[41] Robert N. Hornick, one of the authorities on international arbitration and Indonesian law who submitted an affidavit and report in the district court, provided an explanation for the references to the Indonesian laws in the arbitration clauses unrelated to any intent to designate Indonesia as the country

short of an express designation of Indonesian procedural law necessary to rebut the strong presumption that designating the place of the arbitration also designates the law under which the award is made.

Pertamina and the Republic have belatedly asserted that the district court should have conducted a choice-of-law analysis to determine the law that would apply to the interpretation of the parties' contracts, rather than analyze the contracts under the New York Convention. Pertamina and the Republic assert that the result of such an analysis would have been to identify Indonesian law as the decisional law under which to interpret the contracts. This argument is inconsistent with the position Pertamina-and its experts on interpreting international commercial arbitration agreements-took earlier in this case, that the district court should review the Tribunal's interpretation of the contracts under the New York Convention. A court conducts the multifactor choice-of-law analysis Pertamina now advocates in the absence of an effective choice of law by the parties to an arbitration agreement.[42] In the JOC and ESC, the parties presumptively chose Swiss

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under the law of which the Award would be made. Hornick explained that each article of Indonesian law cited in the contracts imposes a requirement inconsistent with the contemplated arbitration. (Hornick Decl. ¶¶ 28-32) These articles could have been invoked to oppose later enforcement of the Award in Indonesia unless waived. By waiving in advance provisions that could later be invoked to block enforcement of the Award in an Indonesian court, the parties facilitated future enforcement efforts in Indonesia. (*Id.*).

[42] REST. (2D) CONFL. §§ 187, 188, & 218 (1971).

procedural law as the *lex arbitri* when they designated Switzerland as the site of the arbitration, and that presumption is unrebutted.[43]

As the district court, another panel of this court, and the Hong Kong Court of First Instance have all recognized, Pertamina's previous arguments that Swiss arbitral law applied strongly evidence the parties' contractual intent.[44] Pertamina represented to the Tribunal that Swiss procedural law applied.[45]

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[43] Certain sections and comments of the *Restatement* also support a determination that Swiss law applied to the arbitration agreement. *See, e.g. id.* at § 188 (incorporating REST. § 6, which requires consideration of the relevant policies of the forum); *id.* at § 218 cmt. b (suggesting that the arbitration forum may have the most significant relationship to the arbitration and that a contractual provision requiring arbitration to occur in a certain forum may evidence an intention by the parties that the local law of this forum should govern).

[44] *Karaha Bodas Co.*, 335 F.3d at 371; *Hong Kong decision* at 12.

[45] *See, e.g.*, Prelim. Award, § B(1) ("The Respondents support this conclusion by making reference to Swiss law as the JOC and the ESC provide for UNCITRAL Arbitration in Geneva between the parties which are neither Swiss nor Swiss resident. As a result, and under both contracts, the arbitration proceedings are governed by Chapter 12 of the Swiss Private International Law Statutes. Under Swiss law, [Respondent contends] the Arbitral Tribunal is lacking jurisdiction because KBC failed to comply with the contractual prerequisites to arbitration."); *id.* at § C(1) ("The Respondents also state that, under the arbitration agreements and Swiss law, the arbitrators have no power to consolidate ...."); *id.* at § C(3) (citing a Swiss federal tribunal case in support of its decision that a consolidated arbitration was appropriate); *id.* at § D(1) (Respondents contend that "[s]uch solution is not acceptable under the applicable Swiss law").

As but one example, Pertamina cited Swiss procedural law in arguing that the Tribunal could not consolidate the claims under the JOC and ESC into one proceeding. Pertamina at no point argued to the Tribunal that Indonesian procedural law applied. Pertamina initially sought to set aside the Award in a Swiss court.[46] Pertamina asked the Texas district court to stay its enforcement proceeding until Pertamina's appeal in Switzerland was resolved. In making this argument, Pertamina stated that "[t]he arbitration ... was conducted according to the laws of Switzerland, and the Swiss court is empowered to vacate an award rendered in Switzerland.... KBC is asking this Court to act prematurely to confirm an award that might be overturned in the country whose law governed the arbitration."[47]

The Tribunal's decision that Swiss arbitral law applied does not make the Award unenforceable.[48]

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[46] In the district court, Pertamina presented an affidavit and report from an expert on international commercial arbitration that weakly attempted to explain the appeal to the Swiss court as a mistake. The theory that Pertamina's lawyers erred and applied to the wrong court for annulment-and then moved for reconsideration when that court dismissed the appeal-is utterly without support in the record.

[47] *See Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509, 121 S.Ct. 1724, 149 L.Ed.2d 740 (2001) (citations omitted) ("[I]f an 'arbitrator is even arguably construing or applying [a] contract and acting within the scope of his authority,' the fact that 'a court is convinced he committed serious error does not suffice to overturn his decision.' ").

[48] *Europcar Italia*, 156 F.3d at 315; *Nat'l Wrecking Co.*, 990 F.2d at 960;*see Garvey*, 532 U.S. at 509, 121 S.Ct. 1724 ("Courts are not authorized to review [an] arbitrator's decision on the merits despite allegations that the decision rests on factual

The combination of the parties' selection of Switzerland as the site of the arbitration; the failure clearly or expressly to choose Indonesian arbitral law in their agreements, as required to select arbitral law other than that of the place of the arbitration; and the clear evidence provided by the parties' own conduct that they intended Swiss law to apply to the arbitration, amply supports the district court's determination that the Tribunal properly applied Swiss procedural law.

The district court also found that under the doctrine of judicial estoppel, Pertamina's prior conduct precluded it from arguing against the application of Swiss procedural law. The doctrine prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or earlier proceedings.[49] "The policies underlying the doctrine include preventing internal inconsistency, precluding litigants from 'playing fast and loose' with the courts, and prohibiting parties from deliberately changing positions according to the exigencies of the moment."[50] Fifth Circuit courts have identified two

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errors or misinterprets the parties' agreement.").

[49] *Hall v. GE Plastic Pac. PTE Ltd.*, 327 F.3d 391, 396 (5th Cir.2003); *see In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir.1999) (quoting *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir.1988)) (describing judicial estoppel as "a common law doctrine by which a party who has assumed one position in his pleadings may be estopped from assuming an inconsistent position"); *see also Ahrens v. Perot Sys. Corp.*, 205 F.3d 831, 833 (5th Cir.2000); *Ergo Science, Inc. v. Martin*, 73 F.3d 595, 598-600 (5th Cir.1996).

[50] *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir.1993).

limitations on judicial estoppel: (1) the position of the party to be estopped must be clearly inconsistent with its prior position; and (2) the court must have accepted that prior position.[51] Judicial acceptance requires that the court adopted the position previously urged by a party, whether as a preliminary matter or as part of a final disposition.[52]

The district court did not abuse its discretion in imposing judicial estoppel to preclude Pertamina from arguing against the application of Swiss procedural law. Pertamina repeatedly represented to the Tribunal and to the district court that Swiss procedural law controlled the arbitration.[53] Both the Tribunal and the district court relied on these representations in their decisionmaking. In the Award, the Tribunal accepted Pertamina's argument that Swiss procedural law applied. The district court adopted Pertamina's position that Swiss law applied in delaying the enforcement proceedings pending the Swiss court's resolution of the appeal.[54] Pertamina's argument that Indonesian procedural law governed the arbitration is clearly inconsistent with its prior position that Swiss procedural law controlled.[55]

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[51] *Hall*, 327 F.3d at 396; *Ahrens*, 205 F.3d at 833; *Coastal Plains*, 179 F.3d at 206.

[52] *Coastal Plains*, 179 F.3d at 206.

[53] *See* note 24.

[54] *See Coastal Plains*, 179 F.3d at 206 (noting that the acceptance prong of judicial estoppel can be satisfied by a court's acceptance of a party's position "as a preliminary matter").

[55] *See Hall*, 327 F.3d at 396; *Ahrens*, 205 F.3d at 833; *Coastal Plains*, 179 F.3d at 206.

Pertamina belatedly suggests that its positions are not inconsistent because the New York Convention permits multiple primary jurisdictions. As addressed more fully below, this record makes it clear that only the Swiss courts had primary jurisdiction over this Award. Judicial estoppel provides an additional ground for concluding that Swiss procedural law applied to the arbitration proceeding.[56]

C. The Procedural Challenges to the Arbitral Award

1. Consolidation of the Claims under the JOC and ESC into One Arbitration Proceeding

Under Article V(1)(d) of the New York Convention, a court may refuse to enforce an arbitration award if "[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place."[57] Pertamina argues that because the JOC and ESC were separate contracts with separate arbitration clauses, and because neither contract

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[56] *See Hall*, 327 F.3d at 396; *Coastal Plains*, 179 F.3d at 206;*Ahrens*, 205 F.3d at 833. The High Court of Hong Kong Court estopped Pertamina from asserting application of Indonesian procedural law for the same reasons. *Hong Kong decision* at 9-12. The High Court also emphasized the dilatoriness of Pertamina's argument: "Pertamina's position on the [applicable procedural law] only changed 30 months after the preliminary award was published, 15 months after the Final award (December 2000) and seven months after the Swiss Court dismissed the petition for revision (August 2001)." *Id.* at 11.

[57] 9 U.S.C. § 201, Art. V(1)(d).

expressly allowed the consolidation of claims, the Tribunal improperly consolidated the claims into one arbitration proceeding. Pertamina also contends on appeal that because Indonesian rather than Swiss procedural law governed the arbitration, the Tribunal's reliance on Swiss procedural law to consolidate the claims was erroneous.

The Tribunal carefully analyzed the parties' contracts in concluding that a consolidated arbitration of KBC's claims against Pertamina and PLN under the JOC and ESC was appropriate. In factual findings set out in the Preliminary Award, the Tribunal set out the basis for concluding that the two contracts were integrated such that "the parties did not contemplate the performance of two independent contracts but the performance of a single project consisting of two closely related parties."[58] The Tribunal continued:

In such circumstances, the conclusion of this Arbitral Tribunal is that KBC's single action should be admitted, provided it is appropriate. The Arbitral Tribunal has not the slightest doubt in this respect. Due to the integration of the two contracts and the

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[58] Article 15.3 of the ESC provided that "the terms of [the ESC] and the Joint Operation Contract constitute the entire agreement between the parties hereto." Article 1.2 of the JOC stated that "[e]ach such Energy Sales Contract shall be an integral part of this contract, and to the extent the provisions of the Energy Sales Contract obligate the parties hereto, shall be deemed incorporated into this contract for all purposes." Pertamina and KBC entered into the JOC and ESC on the same day. The JOC and the ESC contained virtually identical arbitration provisions.

fact that the Presidential Decrees, the consequences of which are at the origin of the dispute, affected both of them, the initiation of two separate arbitrations would be artificial and would generate the risk of contradictory decisions. Moreover, it would increase the costs of all the parties involved, an element of special weight in the light of difficulties faced by the Indonesian economy, to which counsel for [Pertamina] legitimately drew the Arbitral Tribunal's attention. The record provides ample support for the Tribunal's findings and conclusion that the two contracts were integrated such that the parties contemplated a single arbitration.

The Tribunal cited the Swiss law concept of "connexity" in analyzing the legal relations among KBC and Pertamina under the JOC and KBC, Pertamina, and PLN under the ESC as one of the factors justifying the consolidation of claims under the two contracts into one arbitration proceeding. The Tribunal concluded that the relationship of the JOC and ESC exceeded the standard of "connexity" under Swiss law. "The use of the word 'connexity' to describe the relationship between the JOC and the ESC would be an understatement. In reality, the two contracts are integrated." Courts and arbitration tribunals have recognized that claims arising under integrated contracts may be consolidated into single arbitrations.[59] The Tribunal cited one other factor

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[59] *See, e.g., Conn. Gen. Life Ins. Co. v. Sun Life Assur. Co. of Canada*, 210 F.3d 771, 774 (7th Cir.2000); *Maxum Found., Inc. v. Salus Corp.*, 817 F.2d 1086, 1087-88 (4th Cir.1987). Pertamina cites cases decided under the FAA and the law of different American jurisdictions for the proposition that courts do not have the authority to order arbitrations without the

that supported consolidation: "appropriateness." The parties agreed to the application of the UNCITRAL Rules, which permit a tribunal to conduct an arbitration "in such manner as it considers appropriate."[60] Pertamina does not dispute the application of the UNCITRAL Rules to the arbitration proceeding.

Courts are reluctant to set aside arbitral awards under the New York Convention based on procedural violations, reflected in cases holding that the Convention embodies a proenforcement bias.[61] The Tribunal emphasized in its Preliminary Award that although the claims would be consolidated, "the

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parties' approval. *See, e.g., Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 221, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985) ("The preeminent concern of Congress in passing the [FAA] was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation...."); *Gov't of the United Kingdom of Great Britain and N. Ireland v. Boeing Co.,* 998 F.2d 68, 74 (2d Cir.1993); *Protective Life Ins. Corp. v. Lincoln Nat. Life Ins. Corp.,* 873 F.2d 281, 282 (11th Cir.1989). These cases do not involve contracts so closely related as to manifest the parties' agreement to be joined in arbitration proceedings involving parties and claims under those integrated contracts.

[60] UNCITRAL Arbitration Rules at Art. 15(1).

[61] *See, e.g., China Minmetals Materials Imp. and Exp. Co., Ltd. v. Chi Mei Corp.,* 334 F.3d 274, 282-83 (3d Cir.2003); *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.,* 284 F.3d 1114, 1120 (9th Cir.2002); *Alghanim,* 126 F.3d at 20;*Parsons & Whittemore Overseas,* 508 F.2d at 973; *Compagnie des Bauxites de Guinee v. Hammermills, Inc.,* 1992 WL 122712, at *5 (D.D.C. May 29, 1992); *Am. Constr. Mach. & Equip. Corp. Ltd. v. Mechanised Constr. of Pakistan, Ltd.,* 659 F.Supp. 426, 428 (S.D.N.Y.1987).

position of each party has to be considered independently when discussing the substance of the case, on the basis of their respective legal and contractual situations." The record reflects that the Tribunal kept this promise. There is no prejudice arising from the consolidation that would justify a refusal to enforce the Award.

2. The Composition of The Tribunal

Under Article V(1)(d), a court may refuse enforcement of an arbitral award if the composition of the tribunal is not in accordance with the parties' agreement.[62] The JOC provided for the appointment of arbitrators, as follows:

Each Party [KBC and Pertamina] will appoint an arbitrator within thirty (30) days after the date of a request to initiate arbitration, who will then jointly appoint a third arbitrator within thirty (30) days of the date of the appointment of the second arbitrator, to act as Chairman of the Tribunal. Arbitrators not appointed within the time limits set forth in the preceding sentence shall be appointed by the Secretary General of the International Center for Settlement of Investment Disputes.

The ESC procedure for arbitrators' appointment was slightly different:

> PLN on one hand, and [KBC] and PERTAMINA, on the other hand, will each appoint one arbitrator, in each case within

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[62] 9 U.S.C. § 201, Art. V(1)(d).

> thirty (30) days after the date of a request to initiate arbitration, who will then jointly appoint a third arbitrator within thirty (30) days of the date of the appointment of the second arbitrator, to act as Chairman of the Tribunal. Arbitrators not appointed within the time limits set forth in the preceding sentence shall be appointed by the Secretary General of the International Center for Settlement of Investment Disputes, upon the request of any Party.

Each contract required the appointment of arbitrators within thirty days of the notice of arbitration and provided for appointment by the ICSID in the event that a party did not do so.

In its notice of arbitration sent to Pertamina, KBC appointed Professor Piero Bernardini to serve as an arbitrator. Pertamina did not designate an arbitrator within thirty days, nor did it object to KBC's selection at that time. By letter dated June 2, 1998, KBC notified the ICSID of Pertamina's inaction and requested the appointment of a second arbitrator under the default appointment provisions of the contracts. Pertamina did not respond to this letter. The ICSID questioned KBC about the consolidation of claims under the JOC and the ESC and KBC's unilateral appointment of an arbitrator. KBC responded by letter dated June 22, 1998. The ICSID confirmed receipt of KBC's letters and in a June 29, 1998 letter to all parties, recapped the prior correspondence, noted Pertamina's failure to respond, and expressed its intent to grant KBC's request to appoint the second arbitrator. The ICSID

Secretary-General identified Dr. Ahmed El-Kosheri as its candidate and asked for any objections by July 13, 1998. The ICSID sent all the preceding correspondence to PLN by courier and to Pertamina by fax and courier. Despite the Secretary-General's invitation to do so, neither Pertamina nor PLN lodged objections or responses to the proposed appointment. On July 13, 1998, having received no communications from Pertamina, the ICSID notified Pertamina and PLN of its intent to appoint Dr. El-Kosheri and made the appointment on July 15, 1998. Under the JOC and ESC, Professor Bernardini and Dr. El-Kosheri then selected the chairman of the arbitration panel, Yves Derains.

In its Preliminary Award, the Tribunal rejected Pertamina's argument that KBC's selection of an arbitrator violated the ESC's requirement that KBC and Pertamina jointly make the nomination. The Tribunal found that the parties intended to limit that requirement to disputes in which PLN was opposed to KBC and Pertamina. Because the ESC did not expressly address the method for appointing arbitrators when KBC and Pertamina opposed each other, the Tribunal found that UNCITRAL Arbitration Rules for appointment applied. The Tribunal ruled that the appointment procedures used did not violate these rules or create an inequality of treatment. The Tribunal emphasized Pertamina's failure to nominate an arbitrator or object to those nominated. The district court agreed with the Tribunal's reasoning and added that Pertamina had failed to demonstrate any prejudice from the appointment proceedings.

On appeal, Pertamina reasserts its argument that KBC's unilateral selection of an arbitrator violated the ESC's requirement that "PLN on the one hand and [KBC] and Pertamina, on the other hand, will each appoint one arbitrator." Pertamina contends that its interests would always be aligned with KBC under the ESC, which required PLN to purchase from Pertamina the electricity that KBC provided, and that this explains the contractual requirement that KBC and Pertamina agree on an arbitrator in a dispute arising under that contract. In response, KBC argues that the Tribunal correctly found that a dispute between KBC and Pertamina was possible under the ESC, but in the event of such a dispute, the ESC did not provide a procedure for choosing an arbitrator. KBC asserts that the Tribunal correctly found that the general UNCITRAL rules for selecting an arbitrator would apply, under which KBC, Pertamina, and PLN would each appoint an arbitrator. In addition, KBC argues that the district court correctly found that Pertamina had failed to object to KBC's selection of Professor Bernardini as an arbitrator and failed to nominate an arbitrator despite the ICSID's requests. Finally, KBC argues that Pertamina cannot show prejudice that would make the Award unenforceable.

The ESC arbitration clause refers to "any dispute or difference of any kind whatsoever" arising among "the Parties." Section 2 of the ESC defines "parties" to include PLN, Pertamina, and KBC. By its terms, the arbitration clause covers a dispute between KBC and Pertamina arising under the ESC, as well as a dispute in which the interests of KBC and Pertamina are aligned. If the ESC required KBC and Pertamina

jointly to select an arbitrator for disputes in which KBC and Pertamina were opposed, as Pertamina contends, Pertamina could effectively block arbitration under the ESC simply by refusing to agree with KBC to the selection of an arbitrator. Such an interpretation would make the ESC arbitration clause illusory. In addition, Pertamina had numerous opportunities early in the proceedings to object to KBC's selection of Professor Bernardini as an arbitrator and to nominate its own arbitrator. Pertamina did not challenge the composition of the arbitral panel until after the entire panel had been selected and seated. Pertamina's failure timely to object to Professor Bernardini's selection and to nominate its own arbitrator was, as the district court noted, a strategic decision that Pertamina should not now be able to assert as a defense to enforcing the Award.[63]

Pertamina has failed to meet its burden of showing that the Tribunal was improperly constituted. The Tribunal reasonably interpreted the ESC's arbitration provisions and reasonably applied the UNCITRAL arbitration rules. Despite numerous opportunities, Pertamina failed to challenge the Tribunal's composition until after the arbitrators were selected. The procedural infirmities Pertamina alleges do not provide grounds for denying

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[63] Pertamina apparently argued to the Tribunal that it did not name an arbitrator because it was contesting the legitimacy of the arbitration and further contended that it did not receive certain correspondence from ICSID regarding KBC's request that the ICSID appoint a second arbitrator. Pertamina, however, did not make these arguments before the district court.

enforcement of the Award.

D. The Due Process Challenges to the Arbitral Award

Under Article V(1)(b), enforcement of a foreign arbitral award may be denied if the party challenging the award was "not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present [its] case."[64] Article V(1)(b) "essentially sanctions the application of the forum state's standards of due process," in this case, United States standards of due process.[65] A fundamentally fair hearing requires that a party to a foreign arbitration be able to present its case.[66] A fundamentally fair hearing is one that "meets 'the minimal requirements of fairness'-adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator."[67] The parties must have an opportunity to be heard "at a meaningful time and in a meaningful manner."[68] "The right to due process does not include the complete set of procedural rights guaranteed by the Federal Rules of Civil

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[64] 9 U.S.C. § 201, Art. V(1)(b).

[65] *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 145 (2d Cir.1992) (quoting *Parsons & Whittemore Overseas*, 508 F.2d at 975).

[66] *Slaney v. Int'l Amateur Athletic Fed'n*, 244 F.3d 580, 592 (7th Cir.2001); *Generica, Ltd. v. Pharm. Basics, Inc.*, 125 F.3d 1123, 1130 (7th Cir.1997).

[67] *Slaney*, 244 F.3d at 592 (quoting *Sunshine Mining Co. v. United Steelworkers*, 823 F.2d 1289, 1295 (9th Cir.1987)); *Generica*, 125 F.3d at 1130 (quoting same).

[68] *Iran Aircraft Indus.*, 980 F.2d at 146 (citations omitted).

Procedure."[69]

1. The Claim that the Final Award "Reversed" the Preliminary Award

Pertamina first contends that the Tribunal reversed the Preliminary Award in the Final Award without notice, denying Pertamina the opportunity to be "meaningfully heard." Pertamina emphasizes the Tribunal's ruling that "a governmental decision which prevents KBC [from] perform[ing] its obligations is not deemed to be a breach of contract by Pertamina or PLN but a Force Majeure event excusing KBC's nonperformance."

The Tribunal stated in the Preliminary Award that the force majeure clause in the JOC and ESC made a "government-related event" an event of force majeure only with respect to KBC. The Tribunal stated that Pertamina and PLN were so closely related to the Indonesian government that a decision by the Indonesian government was not a force majeure event as to them. In its briefing before the Tribunal made its Final Award, KBC argued that under the contract language and given the close relationship between Pertamina and the Indonesian government, Pertamina bore the risk of loss from a force majeure event under the JOC and ESC. Pertamina responded that in the Preliminary Award, the Tribunal had ruled that acts of force majeure by the Indonesian government are not breaches of the

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[69] *Matter of Arbitration Between Trans Chem. Ltd. and China Nat. Mach. Imp. & Exp. Corp.*, 978 F.Supp. 266, 310 (S.D.Tex.1997), *aff'd*, 161 F.3d 314 (5th Cir.1998).

JOC and ESC and that to award KBC damages would be incompatible with that ruling. In the Final Award, the Tribunal found that the Indonesian government's actions were an event of force majeure that excused KBC's failure to perform under the JOC and ESC. The Tribunal stated that this finding did not contradict its ruling in the Preliminary Award that the Indonesian government was not a party to the JOC or ESC, because that ruling "was not meant to express any view as to the consequences to Pertamina ... of a Governmental decision which prevents the performance of the Contracts."

The record shows that Pertamina knew it could be found liable for nonperformance after the Preliminary Award had issued. After the Preliminary Award issued, KBC argued to the Tribunal that Pertamina bore the risk of nonperformance under the JOC and ESC in the event of force majeure. KBC's argument clearly assumed that the Preliminary Award allowed the Tribunal to find that the contracts placed the risk of, and liability for, such nonperformance on Pertamina. In response to that argument, Pertamina had, and took, the opportunity fully to present its arguments against KBC's theory of liability.

The Final Award shows that the Tribunal considered and rejected Pertamina's argument in making its liability decision. The Tribunal concluded that the JOC and ESC allocated the risk of government interference with the project solely to Pertamina and PLN. In this enforcement proceeding, Pertamina is essentially repeating the arguments it made to the Tribunal. The fact that those arguments

were presented to and considered by the Tribunal is inconsistent with Pertamina's claim that it had no notice of the need to make the argument to that Tribunal or the opportunity to do so. Pertamina did not suffer the fundamental unfairness it claims, so as to support a refusal to enforce the Award.[70]

2. The Tribunal's Denial of a Continuance and Request for Additional Discovery

To challenge KBC's contention that FPL was willing to finance the project, Pertamina sought in the arbitration proceeding a continuance and discovery of the following documents from KBC, FPL, and Caithness regarding the financing of the KBC project:

> (1) All documents relating to efforts to obtain financing for the Karaha-Bodas project during the period September 1997 through June 1998.
> (2) All documents showing any consideration of providing direct financing (whether through bridge financing, a loan guarantee, or direct equity investment) for the Karaha-Bodas project during the period September 1997 through June 1998.
> (3) All documents relating to FPL's, its subsidiaries', or its predecessors' consideration of whether to invest in the Karaha-Bodas project.
> (4) All documents relating to FPL's, its

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[70] *See Europcar Italia*, 156 F.3d at 315 ("Absent extraordinary circumstances, a confirming court is not to reconsider the arbitrator's findings.").

> subsidiaries', or its predecessors' decision to invest in the Karaha-Bodas project, stated variously to have occurred in mid-1996 or mid-1997.
>
> (5) All documents sent by KBC to FPL, its subsidiaries, or its predecessors following the investment identified in ¶ 4 and concerning geothermal exploration and development in the Karaha-Bodas concession area (whether such exploration occurred before or after the investment).
>
> (6) All documents relating to evaluation by each, any and all of KBC, FPL (or subsidiaries or predecessors), and Caithness whether to proceed with the Karaha-Bodas project during the period September 1997 through June 1998.

The Tribunal denied Pertamina's request.

After Pertamina discovered that FPL and certain other investors in KBC owned a political risk insurance policy underwritten by Lloyd's of London, which had paid $75 million after the project suspension, Pertamina sought reconsideration of the district court's summary judgment enforcing the Award under Rule 60(b). The district court found that Pertamina's inability to introduce evidence of the insurance policy at the arbitration did not prevent the presentation of its case to the Tribunal. The district court also held that KBC's failure to bring the insurance policy to the Tribunal's attention did not make enforcing the Award a violation of public policy. We agree.

"An 'arbitrator is not bound to hear all of the

evidence tendered by the parties.... [He] must give each of the parties to the dispute an adequate opportunity to present its evidence and arguments.' "[71] It is appropriate to vacate an arbitral award if the exclusion of relevant evidence deprives a party of a fair hearing.[72] "Every failure of an arbitrator to receive relevant evidence does not constitute misconduct requiring vacatur of an arbitrator's award. A federal court may vacate an arbitrator's award only if the arbitrator's refusal to hear pertinent and material evidence prejudices the rights of the parties to the arbitration proceedings."[73]

Although the Tribunal denied Pertamina the specific discovery it sought on the issue of FPL financing, Pertamina was able to cross-examine the KBC witnesses who testified that FPL was willing to provide financing for the project, Leslie Gelber and Robert McGrath. Before those witnesses testified, Pertamina had already presented substantial evidence in its response to KBC's Statement of Claim as to why KBC would not have been able to secure financing for the project, emphasizing the depressed state of the Indonesian economy and its unattractiveness to investors. Pertamina argued to

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[71] *Generica*, 125 F.3d at 1130 (quoting *Hoteles Condado Beach, La Concha and Convention Ctr. v. Union De Tronquistas Local 901*, 763 F.2d 34, 39 (1st Cir.1985)); *see Slaney*, 244 F.3d at 592 (cautioning that "parties that have chosen to remedy their disputes through arbitration rather than litigation should not expect the same procedures they would find in the judicial arena").

[72] *Generica*, 125 F.3d at 1130; *Slaney*, 244 F.3d at 592.

[73] *Hoteles Condado Beach*, 763 F.2d at 40 (internal citations omitted).

the Tribunal that KBC had presented no documentary evidence of FPL's willingness to finance the project and asserted that FPL would have required such a high rate of interest because of the risk involved as to make the KBC venture unprofitable.

The Tribunal found that "the issue remained open in 1998 of the terms and conditions upon which financing could have been obtained for the Project development." The Tribunal noted that "the worsening of the economic and political situation in Indonesia at the time has to be taken into account as regards both the conditions at which financing could have been obtained and possible delays in arranging the same." The Tribunal, however, noted that the parties contemplated the possibility of a delay in arranging financing, because the ESC provided that the contract could be suspended for up to two years if KBC was unable to arrange financing for the project. The Tribunal also noted KBC's efforts to reinstate the project after the initial government suspension order, finding that KBC was ready and willing to secure financing for the project. The Tribunal found the testimony of KBC's witnesses on financing credible, stating that it had "no reason ... to cast doubts about KBC's readiness, directly and/or through its shareholders, to make provision thereof." In determining the lost profits, the Tribunal considered all the risks of the project, including the potential difficulties in arranging financing that Pertamina cited, and "significantly reduc[ed]" the amount of lost profits claimed by KBC.

In *Generica, Ltd. v. Pharmaceutical Basics, Inc.*,[74] the party opposing enforcement of an international arbitration award argued that the tribunal curtailed cross-examination of a witness, in violation of the party's due process right to present its case.[75] The tribunal, recognizing that it had curtailed the cross-examination, placed diminished reliance on the witness's testimony.[76] The court found that by limiting the reliance on the witness's testimony, the arbitrators eliminated the possibility of prejudice to the party claiming a due process violation.[77] The court confirmed the award.[78] As in *Generica,* the Tribunal appears to have given all the evidence as to damages, including the availability of financing, appropriate weight in determining liability and damages.

In *Tempo Shain Corp. v. Bertek, Inc.*,[79] the arbitral panel did not allow a potential witness to testify on the basis that the witness's testimony was cumulative.[80] The court vacated the arbitral award.[81] The record showed that the witness would have testified to facts that only he could have known, making his testimony essential.[82] Similarly, in

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74 125 F.3d 1123 (7th Cir.1997).

75 *Id.* at 1129-31.

76 *Id.* at 1131.

77 *Id.*

78 *Id.*

79 120 F.3d 16 (2d Cir.1997).

80 *Id.* at 20.

81 *Id.* at 21.

82 *Id.* at 20.

Hoteles Condado Beach, La Concha and Convention Center v. Union De Tronquistas Local 901,[83] the court vacated an award because the arbitral panel refused to give any weight to the only evidence available to the losing party.[84] In the present case, by contrast, the Tribunal's language in the Final Award and the record show that the testimony about FPL's willingness to provide financing was only one factor relevant to damages. KBC raised the possibility of FPL's direct financing only in response to Pertamina's affirmative defense that KBC could not have financed the project. Pertamina did not seek discovery on KBC's efforts to finance the project in the arbitration proceeding until after KBC filed its rebuttal to the response to the Statement of Claim, despite the fact that Pertamina raised the issue as an affirmative defense.

The record shows that the Tribunal's refusal to grant a continuance and additional prehearing discovery did not "so affect the rights of [Pertamina] that it may be said that [it] was deprived of a fair hearing."[85] Pertamina was able to present comprehensive evidence of investment conditions in Indonesia and expert opinions on the availability of financing, as well as cross-examine Gelber and McGrath on FPL's asserted willingness and ability to provide financing.[86]

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[83] 763 F.2d 34 (1st Cir.1985).

[84] *Id.* at 40.

[85] *Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co.*, 397 F.2d 594, 599 (3d Cir.1968).

[86] Pertamina acknowledges that it specifically examined Gelber and McGrath about the existence of documents

Pertamina contends that the late revelation of the political risk insurance policy refutes KBC's contention in the arbitration that FPL was willing to finance KBC to protect the $40 million it had previously invested in KBC. The existence of the political insurance policy was not "central or decisive" to Pertamina's case.[87] In order to show damages, KBC had to show that if the project had not been suspended, KBC could have proceeded to perform by obtaining financing. The record amply supports KBC's position that KBC and FPL had already invested substantial money before the Indonesian government issued its suspension order. The existence of the political risk insurance policy is not inconsistent with the testimony of Gelber and McGrath that FPL intended to finance the project and would have done so but for the suspension decreed by the government of Indonesia. The existence of political risk insurance for the project is not inconsistent with FPL's willingness to invest had the project not been suspended, that is, if the risk insured against had not occurred. The Tribunal's damages analysis and the lost profits award

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regarding FPL's willingness to finance the project. Pertamina states that the Tribunal had to instruct McGrath to answer the question directly, demonstrating that McGrath was an "evasive" witness. The Tribunal observed McGrath testify and was able to make the credibility judgment that he either lacked knowledge of such documents or was unwilling to discuss them. *Cf. United States v. Garza*, 118 F.3d 278, 283 (5th Cir.1997) (noting that a district court is in the best position to judge the credibility of witnesses and refusing to "second-guess" the lower court's judgment on the issue).

[87] *Cf. Hoteles Condado Beach*, 763 F.2d at 40 (denial of party's only evidence was ground for vacating award).

depended on the assumption that the project continued, that is, that the suspension had not taken place.

Pertamina's argument that KBC's political risk insurance policy undermines the Tribunal's finding that the JOC and ESC placed the risk of a government-related event on Pertamina is also unavailing. The Tribunal determined that the JOC and ESC placed the risk of nonperformance due to a government-related event on Pertamina based on a well-reasoned, detailed analysis of the contract terms.[88] The existence of a political risk policy does not undermine this result. Moreover, the political risk policy contained a subrogation provision that required KBC to reimburse the insurer if KBC recovered its losses from another source.[89] The

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[88] *See, e.g., Talman Home Fed. Sav. & Loan Ass'n of Ill. v. Am. Bankers Ins.*, 924 F.2d 1347, 1351 (5th Cir.1991) (quoting *Republic Nat'l Bank of Dallas v. Nat'l Bankers Life Ins. Co.*, 427 S.W.2d 76, 79 (Tex.App.-Dallas 1968, writ ref'd)) ("The cardinal rule of construction as applied to all contracts is to ascertain the intention of the parties as expressed in the language used in the instrument itself. It is the intention and purpose of contracting parties, as disclosed within the four corners on the instrument which should control.").

[89] This subrogation provision undermines Pertamina's additional argument that, in the alternative, it is entitled to a $75 millior offset from the political risk insurance payout. Pertamina argues that enforcement of the judgment, in combination with the insurance proceeds, will permit KBC double recovery in violation of the single-satisfaction rule. *See Tompkins v. Cyr*, 202 F.3d 770, 785 (5th Cir.2000). The subrogation provision of the political risk insurance policy, however, requires that to the extent the insured obtains any recovery from a judgment against Pertamina, the insured is obligated to repay the insurer. In addition, payment by a

existence of the political risk policy is not inconsistent with the contractual allocation of risk.

The Tribunal asked McGrath whether FPL had purchased "OPIC insurance," a form of political risk insurance. McGrath responded that he did not know the answer to the question. Pertamina's counsel did not follow up on the Tribunal's questioning. At the conclusion of the hearing, the Tribunal chair asked the parties whether the discovery requests were "maintained, all of them, part of them, because we would like to know on what we have to decide." The response from counsel for Pertamina was as follows:

> [T]he purpose of discovery is to prepare for the hearing, it is not to supplement the record after the hearing. So I think the discovery requests are moot, and if discovery is now permitted, then you have to re-open the proceedings and so on. So I treated, notwithstanding the fact that it was theoretically open, I treated this request as effectively being denied, and we went forward. Our request went to the purported financial ability, the purported financing that would have been made available and other things, and I think the record on that has been fully made. I am prepared to rest on that record, and so I think the discovery requests should no longer be in the picture.

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collateral source does not typically diminish a judgment debt. *See Global Petrotech, Inc. v. Engelhard Corp.*, 58 F.3d 198, 202 (5th Cir.1995). There will be no double recovery, and Pertamina is not entitled to a credit.

The parties submitted extensive posttrial briefs. In the Final Award, issued in December 2000, the Tribunal stated that all parties had "waived their respective requests for discovery" at the conclusion of the hearing.

Pertamina asserts that it did not waive its requests for discovery because the Tribunal denied the request before the hearing, when the discovery could have been of use. Pertamina ignores the fact that in international commercial arbitration, it is not uncommon to ask for additional discovery or information after a hearing, to request additional sessions of a hearing to submit more evidence, or to file posthearing submissions.[90] Rather than renew its requests for discovery into FPL's willingness to finance the project or to assert a request for discovery into FPL's political risk insurance, Pertamina's counsel expressly stated that the record had been "fully made" and that he was "prepared to rest on the record." The record supports the Tribunal's

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[90] *See, e.g., UNCITRAL Arbitration Rules* at Art. 15(2), 29(2) (stating that a party may request at any stage of the proceeding a hearing for presentation of evidence and that a tribunal may reopen hearings at any time upon request of a party); Jay E. Grenig, *Alternative Dispute Resolution with Forms*, § 5.76 (2d ed.1997) (including in a description of the customary order of arbitration proceedings the "submission of post-hearing briefs"). *See also Lincoln Nat'l Life Ins. Co. v. Payne*, 286 F.Supp.2d 1023, 1026 (S.D.Iowa 2003); *Techcapital Corp. v. Amoco Corp.*, 2001 WL 267010, at * 2 (S.D.N.Y. March 19, 2001); *Mays v. Lanier Worldwide, Inc.*, 115 F.Supp.2d 1330, 1342 (M.D.Ala.2000); *I. Appel Corp. v. Katz*, 1999 WL 287370, at * 3 n. 2 (S.D.N.Y. May 6, 1999); *United Foods, Inc. v. W. Conference of Teamsters Pension Trust Fund*, 816 F.Supp. 602, 607 (N.D.Cal.1993).

conclusion that the discovery requests made before the hearing had been waived. Pertamina did not ask for discovery into political risk insurance until it filed its Rule 60(b) motion in the district court.

The Tribunal's denial of a continuance and additional discovery did not prevent Pertamina from presenting its case, so as to deprive it of a fair hearing. Pertamina presented ample evidence in support of its position that KBC would be unable to find financing. The Tribunal considered Pertamina's evidence and gave it considerable weight, awarding KBC damages substantially lower than the amount it sought.[91] Pertamina has failed to show the prejudice required to decline enforcement of the Award on this ground.

3. The District Court's Denial of Pertamina's Rule 56(f) Discovery Request

In the district court, after KBC moved for summary judgment on its application to enforce the Award, Pertamina moved for a continuance under Rule 56(f) and sought the same discovery on FPL's willingness and ability to provide project financing that it had sought in the arbitration. The district court denied the Rule 56(f) motion.

The denial of a Rule 56(f) discovery request is

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[91] KBC sought $512.5 million in lost profits. The Tribunal awarded KBC $150 million in lost profits. The Tribunal also awarded KBC $111.1 million in lost expenditures.

reviewed for abuse of discretion.[92] The district court may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts.[93] "If it appears that further discovery will not produce evidence creating a genuine issue of material fact, the district court may, in the exercise of its discretion, grant summary judgment."[94] As one court has explained:

> In judging discovery requests in this context [of an arbitration award confirmation proceeding], the court must weigh the asserted need for hitherto undisclosed information and assess the impact of granting such discovery on the arbitral process. The inquiry is an entirely practical one, and is necessarily keyed to the specific issues raised by the party challenging the award and the degree to which those issues implicated factual questions that cannot be reliably resolved without some further disclosure.[95]

The record shows that in the arbitration, Pertamina was able to present substantial evidence regarding the Indonesian economy, the problems in securing financing for projects in Indonesia, and the projected electrical generating capacity of the project.

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[92] *Resolution Trust Corp. v. Sharif-Munir-Davidson Dev. Corp.*, 992 F.2d 1398, 1401 (5th Cir.1993).

[93] *Int'l Shortstop v. Rally's, Inc.*, 939 F.2d 1257, 1267 (5th Cir.1991).

[94] *Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1442 (5th Cir.1993).

[95] *Lummus Global Amazonas S.A. v. Aguaytia Energy del Peru S.R. Ltda.*, 256 F.Supp.2d 594, 626 (S.D.Tex.2002) (citations omitted).

The Tribunal took Pertamina's arguments into account in awarding significantly less in lost profits than KBC had sought. The Tribunal did not solely rely on FPL's willingness to finance the project in determining that KBC was ready to "directly, and/or through its shareholders," finance the project. The Tribunal also looked to KBC's efforts to convince the Indonesian government to restart the project in making this finding. The record supports the district court's denial of a continuance to permit further discovery on KBC's ability to finance the project.

The district court also noted Pertamina's counsel's statement at the conclusion of the arbitration hearing that "the record on [the financing issue] ha[d] been fully made." Pertamina has failed to show that the discovery it sought in the district court would have created disputed fact issues material to determining whether Pertamina received a fundamentally fair hearing before the Tribunal.[96] Because the issue of financing could be reliably resolved without the requested discovery, the district court did not abuse its discretion in denying Pertamina's Rule 56(f) motion.[97]

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[96] *See Krim*, 989 F.2d at 1442.

[97] *See Lummus Global Amazonas*, 256 F.Supp.2d at 626; *Resolution Trust Corp.*, 992 F.2d at 1401. For the same reasons, the district court did not err by refusing to permit additional discovery or host an evidentiary hearing before ruling on Pertamina's Rule 60(b) motion. *See Provident Life and Accident Ins. Co. v. Goel*, 274 F.3d 984, 999 (5th Cir.2001) (noting that the only issues on an appeal of a Rule 60(b) motion are the propriety of the denial of relief and whether the district court abused its discretion in denying relief).

E. The Public Policy Challenge to the Arbitral Award

Pertamina asserts that the Award violated public policy because it violated the international law doctrine of abuse of rights. Pertamina contends that the Award imposes punishment for obeying a government decree. Pertamina also asserts that KBC's failure to disclose the political risk insurance policy during the arbitration makes enforcement of the Award a violation of public policy.

Under Article V(2)(b) of the New York Convention, a court may refuse to recognize or enforce an arbitral award if it "would be contrary to the public policy of that country."[98] The public policy defense is to be "construed narrowly to be applied only where enforcement would violate the forum state's most basic notions of morality and justice."[99] "The general pro-enforcement bias informing the convention ... points to a narrow reading of the public policy defense."[100] Erroneous legal reasoning or misapplication of law is generally not a violation of public policy within the meaning of the New York Convention.[101]

An action violates the abuse of rights doctrine if

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98 9 U.S.C. § 201, Art. V(2)(b).

99 *M & C Corp.*, 87 F.3d at 851 n. 2 (quoting *Fotochrome, Inc. v. Copal Co., Ltd.*, 517 F.2d 512, 516 (2d Cir.1975)); *see Parsons & Whittemore Overseas*, 508 F.2d at 974; *Slaney*, 244 F.3d at 593.

100 *Parsons & Whittemore Overseas*, 508 F.2d at 973.

101 *Coutinho Caro & Co. U.S.A., Inc. v. Marcus Trading, Inc.*, 2000 WL 435566, at *12 (D.Conn. March 14, 2000).

one of the following three factors is present: (1) the predominant motive for the action is to cause harm; (2) the action is totally unreasonable given the lack of any legitimate interest in the exercise of the right and its exercise harms another; and (3) the right is exercised for a purpose other than that for which it exists.[102] The abuse of rights doctrine is not established in American law[103] and KBC's actions do not meet the factors required to trigger its application. The evidence in the record is that KBC pursued the arbitration to recover its costs, expenses, and lost profits from the nonperformance of the JOC and ESC.[104] The record does not support Pertamina's argument that enforcing the Award penalizes obedience to a governmental decree. The Tribunal explained in the Final Award that the JOC and ESC shifted the risk of loss resulting from a government-ordered suspension onto Pertamina and PLN. Pertamina is challenging the substance of the Tribunal's interpretation of the JOC and ESC. An arbitration tribunal's contract interpretation does not violate public policy unless it "violates the most basic notions of morality and justice."[105] The Tribunal's interpretation of the JOC and ESC does not approach this steep threshold.

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[102] Joseph M. Perillo, *Abuse of Rights: A Pervasive Legal Concept*, 27 Pac. L.J. 37, 47 (Fall 1995).

[103] The abuse of rights doctrine is not even fully established in Louisiana, the American jurisdiction that has invoked it. *See Lloyd v. Georgia Gulf Corp.*, 961 F.2d 1190, 1193 n. 4 (5th Cir.1992).

[104] *See* Perillo, 27 Pac. L.J. at 47.

[105] *Slaney*, 244 F.3d at 593.

KBC's failure to disclose the political risk insurance policy does not provide a basis for refusing to enforce the Award. Enforcement of an arbitration award may be refused if the prevailing party furnished perjured evidence to the tribunal or if the award was procured by fraud.[106] Courts apply a three-prong test to determine whether an arbitration award is so affected by fraud: (1) the movant must establish the fraud by clear and convincing evidence; (2) the fraud must not have been discoverable upon the exercise of due diligence before or during the arbitration; and (3) the person challenging the award must show that the fraud materially related to an issue in the arbitration.[107] It is not necessary to establish that the result of the arbitration would have been different if the fraud had not occurred.[108] Courts, however, have held that an arbitration award is not fraudulently obtained when the protesting party had an opportunity to rebut his opponent's claims at the hearing.[109]

In *Biotronik Mess-Und Therapiegeraete GmbH & Co. v. Medford Medical Instrument Co.*,[110] the party opposing enforcement of the award argued that the prevailing party knowingly withheld evidence of an

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[106] *Karppinen v. Karl Kiefer Mach. Co.*, 187 F.2d 32, 34 (2d Cir.1951).

[107] *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1383 (11th Cir.1988).

[108] *Id.*

[109] *See Biotronik Mess-Und Therapiegeraete GmbH & Co. v. Medford Med. Instrument Co.*, 415 F.Supp. 133, 137-38 (D.N.J.1976).

[110] 415 F.Supp. 133 (D.N.J.1976).

agreement that undermined its case.[111] The court stated that while the party opposing enforcement urged fraud, the real complaint was that the party prevailing in the arbitration should have presented evidence favorable to its opponent's case.[112] The court rejected this argument, stating that "a party cannot complain about the nonproduction of evidence when it failed to offer such evidence itself."[113] In *Catz American Co. v. Pearl Grange Fruit Exchange Inc.*,[114] the party opposing enforcement did not ask the arbitrators to bring certain witnesses before the panel, although the prevailing party offered to make the witnesses available.[115] The panel never called for the witnesses' testimony.[116] The party opposing enforcement of the award argued that the prevailing party should nonetheless have produced the witnesses.[117] The court rejected this argument, stating that "[a]rbitrators must be given discretion to determine whether additional evidence is necessary or would simply prolong the proceedings."[118] Because the witnesses were not solely within the prevailing party's control and there was other evidence in the record supporting the other party's position, the court rejected the challenge to the

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111 *Id.* at 137.

112 *Id.* at 138.

113 *Id.*

114 292 F.Supp. 549 (S.D.N.Y.1968).

115 *Id.* at 553.

116 *Id.*

117 *Id.*

118 *Id.*

award.[119]

Pertamina argues that KBC's failure to reveal its political risk insurance policy amounts to misconduct warranting a refusal to enforce the Award. There is no evidence in the record that KBC deliberately misled the Tribunal. When the question of political risk insurance arose and was not clearly resolved, Pertamina had the opportunity to ask additional questions, which it chose not to pursue. The Tribunal gave Pertamina an opportunity to pursue discovery requests, which it declined. KBC's failure to produce evidence of political risk insurance, given Pertamina's decisions not to pursue the subject, does not violate public policy. The district court did not err in refusing to deny enforcement of the Award on the basis of a public policy violation or in refusing to grant a new trial on the basis of Rule 60(b).[120]

F. The Effect of the Indonesian Court's Annulment of the Arbitral Award

Pertamina filed an annulment action in the Central District Court of Jakarta, Indonesia in March 2002. That court annulled the Award on August 27, 2002. Pertamina now contends that the Indonesian court's annulment is a defense to enforcement under the New York Convention. KBC responds that Indonesia cannot be a proper forum for

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[119] *Id.*

[120] *Cf. Biotronik*, 415 F.Supp. at 138; *Catz American*, 292 F.Supp. at 553; *see Goel*, 274 F.3d at 999 (noting that the only issues on an appeal of a Rule 60(b) motion are the propriety of the denial of relief and whether the district court abused its discretion in denying relief).

annulment because Switzerland is the country of primary jurisdiction.

Pertamina argues that the New York Convention permits more than one country to have primary jurisdiction over an arbitration award. Pertamina contends that the Convention's language permitting annulment by a court in "the country in which, or under the law of which, that award was made" allows for two potential primary jurisdiction countries-the country who hosted the arbitration proceeding, and the country whose arbitral procedural law governed that proceeding.[121] Using this reasoning, Pertamina suggests that both Switzerland (the host country) and Indonesia (the country of governing law) have primary jurisdiction over the arbitration in this case.

Pertamina correctly observes that the Convention provides two tests for determining which country has primary jurisdiction over an arbitration award: a country in which an award is made, and a country under the law of which an award is made.[122] The New York Convention suggests the potential for more than one country of primary jurisdiction. Courts and scholars have noted as much.[123]

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[121] The language, " 'the competent authority of the country ... under the law of which, that award was made' refers exclusively to procedural and not substantive law, and more precisely, to the regimen or scheme of arbitral procedural law under which the arbitration was conducted, and not the substantive law ... applied in the case." *Int'l Standard Elec. Corp.*, 745 F.Supp. at 178; *see Alghanim*, 126 F.3d at 21; *M & C Corp.*, 87 F.3d at 848.

[122] 9 U.S.C. § 201, Art. V(1)(e).

[123] *See, e.g., Int'l Standard Electric Corp.*, 745 F.Supp. at 177 (quoting Albert Jan van den Berg, *The New York Arbitration*

Pertamina cites one such scholar as support for its position:

> [A]mbiguity is derived from the fact that the formula does not indicate whether the party seeking the annulment of the award must choose between the court at the seat of the arbitration and the one located in the country under the law of which the award is made-if the two are distinct-or whether it may seek annulment jointly or alternatively before both courts.... Article V(1)(e) of the New York Convention could [ ] be construed as referring to the courts of only one country while giving the party seeking the annulment the possibility to choose between the two countries should the two be distinct.[124]

Although an arbitration agreement may make more than one country eligible for primary jurisdiction under the New York Convention, the predominant view is that the Convention permits only one in any given case.[125] "[M]any commentators and foreign courts have concluded that an action to

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Convention of 1958 350 (Kluwer 1981)); Paul Sanders, *The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 6 Netherlands Int'l L.Rev. 43, 56 (1956).

[124] Hamid G. Gharavi, *The International Effectiveness of the Annulment of An Arbitral Award* (2002).

[125] "The reality, however, seems to be that the Article V(1)(e) formula enables enforcement courts to refuse enforcement of an award annulled by the competent court of the country in which the award was made even if (i) the award was rendered pursuant to the laws of a third State and (ii) annulment proceedings were pending before the court of the country under the law of which the award was made." *Id.*

set aside an award can be brought *only* under the domestic law of the arbitral forum."[126] Pertamina's expert on international arbitration filed a report in the district court, stating that "there can be only one country in which the courts have jurisdiction over an annulment."[127] In its motion to the district court to set aside judgment under Rule 60(b), Pertamina conceded that "[a] primary jurisdiction has exclusive authority to nullify an award on the basis of its own arbitration law." Such "exclusive" primary

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[126] *Alghanim*, 126 F.3d at 22 (citing commentary that the country of origin of the award is the only country with primary jurisdiction).

[127] Supplemental Expert Report of Albert Jan van den Berg, p. 20. Others agree. Professor Paul Sanders concludes that regardless of any ambiguity, Article V(1)(e) grants primary jurisdiction to the courts of only a single country:

> [T]he suspension must have been ordered by or the application for suspension must have been made to a "competent authority of the country in which, or under the law of which, that award was made." Here only one competent authority is meant; either the Court of the country where the award was made, or the Court of the country under the law of which the award was made. These last words were added on a Russian proposal to cover the case that an award has been made f.i. in Germany under French procedural law. In that case the suspension ... according to the Convention should have to be demanded in France and not in Germany.

Sanders, *New York Convention* at 56. In his expert report for KBC, Professor Allen Scott Rau emphasized that "there is *only one national court system that has jurisdiction to consider an application for annulment of an award.*" Scholar Jan Paulsson submits "the fact is that setting aside awards under the New York Convention can take place only in the country in which the award was made." *The Role of Swedish Courts in Transnational Commercial Arbitration*, 21 Va. J. Int'l L. 211, 242 (1981).

jurisdiction in the courts of a single country is consistent with the New York Convention's purpose; facilitates the "orderliness and predictability" necessary to international commercial agreements; and implements the parties' choice of a neutral forum.[128]

In this case, both of the New York Convention criteria for the country with primary jurisdiction point to Switzerland-and only to Switzerland.[129] The Award was made in Switzerland and was made under Swiss procedural law. The parties' arbitration agreement designated Switzerland as the site for the arbitration. This designation presumptively designated Swiss procedural law as the *lex arbitri*, in

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[128] For example, "having a double test, *i.e.* that of the place of arbitration and that of the law governing the arbitration, can give rise to discrepancies." Andreas Bucher and Pierre-Yves Tschanz, *International Arbitration in Switzerland* 164 (1988). As one source has explained:

> For instance, the Federal Republic of Germany does not define German awards as awards made in Germany but as awards governed by German law wherever they are made. As a result, an award purporting to be made in Switzerland under German arbitration law is considered as a Swiss award in Switzerland and as a German award in Germany, with the result that such award could be challenged in both countries. In the reverse situation of an award made in Germany purportedly under Swiss arbitration law, such award is considered as Swiss in Germany and as German in Switzerland (since the place of arbitration is in Germany). As a result, such an award cannot be challenged in either country, but can only be recognized (or denied recognition) under the New York Convention.

Id.

[129] *See Alghanim*, 126 F.3d at 21; *M & C Corp.*, 87 F.3d at 848.

the absence of any express statement making another country's procedural law applicable.

Pertamina's own conduct during and after the arbitration evidences its intent to have Swiss procedural law apply and to have Switzerland be the country of primary jurisdiction over the Award. During the arbitration, Pertamina asserted that Swiss procedural law applied. When it lost the arbitration, Pertamina asked the Swiss court to set aside the Award, acknowledging that the Swiss courts had primary jurisdiction. While that appeal was pending, Pertamina urged the district court in the enforcement proceeding that the Swiss court had exclusive primary jurisdiction-until the Swiss courts rejected Pertamina's appeal.[130]

Under the New York Convention, the parties' arbitration agreement, and this record, Switzerland had primary jurisdiction over the Award.[131] Because Indonesia did not have primary jurisdiction to set aside the Award, this court affirms the district court's conclusion that the Indonesian court's annulment ruling is not a defense to enforcement under the New York Convention.

III. Conclusion

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[130] The district court found that Pertamina "specifically, repeatedly and unequivocally" argued that Swiss arbitration law applied in the arbitration. *See* note 24.

[131] The Hong Kong court enforced the Award after the Indonesian court issued its annulment ruling, stating that "the fact that the court in Indonesia has now annulled the award under its own law is also a matter which has no effect on this court's task." *Hong Kong decision* at 12.

Pertamina's challenges to the district court's decision affirming the Award are without merit. The summary judgment enforcing the Award is AFFIRMED.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

KARAHA BODAS COMPANY, L.L.C., *Plaintiff-Appellee*,

v.

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA; ET AL., *Defendants*,

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA, *Defendant-Appellant*.

No. 02-20550

June 18, 2003

William A. Isaacson (argued), Jonathan D. Schiller, Alison E. Peck, Boies, Schiller & Flexner, Washington, DC, Kenneth Stuart Marks, Susman Godfrey, Houston, TX, for Plaintiff-Appellee.

Matthew D. Slater (argued), Charles Frederick Lettow, Janie A. Chuang, William Sullivan Fultz, Cleary, Gottlieb, Steen & Hamilton, Washington, DC, F. Walter Conrad, Jr., Michael L. Brem, Baker Botts, Houston, TX, for Defendant-Appellant.

Carolyn B. Lamm, White & Case, Washington, DC,

John E. O'Neill, Clements, O'Neill, Pierce, Wilson & Fulkerson, Houston, TX, for Republic of Indonesia, Amicus Curiae.

Appeal from the United States District Court for the Southern District of Texas.

Before WIENER and STEWART, Circuit Judges, and RESTANI, Judge.*

WIENER, Circuit Judge:

Defendant-Appellant Perusahaan Pertam-bangan Minyak Dan Gas Bumi Negara ("Pertamina") appeals the district court's preliminary injunction prohibiting it from prosecuting an action it instituted in Indonesia (1) to annul a Swiss arbitration award (the "Award") to Appellee, Karaha Bodas Company, L.L.C. ("KBC") and (2) to enjoin KBC from taking steps to enforce the Award.[1] In addition, Pertamina

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* Judge of the U.S. Court of International Trade, sitting by designation.

[1] In a separate challenge, Pertamina has appealed the district court's judgment enforcing the arbitral award. *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* 190 F.Supp.2d 936 (S.D.Tex.2001). KBC moved to consolidate oral argument on enforcement of the Award with the appeal here on the preliminary injunction but that motion was denied. Order dated September 5th, 2002. In March, 2003, the panel addressing enforcement remanded the case for consideration of Pertamina's Rule 60(b) motion, and in April, 2003, the district court denied in part Pertamina's motion. In addition to the enforcement judgment itself, there are subsequent similar injunctions issued by the district court that are not before us. *See, e.g.,* July 22, 2002 Order (requiring Pertamina to unequivocally and strenuously request that the

challenges the district court's order holding it in contempt for continuing to pursue the Indonesian action in violation of the court's initial temporary restraining order ("TRO").[2] Given the structure and purpose of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention" or the "Convention"),[3] and the responsibilities of the United States under that treaty, we conclude that the district court abused its discretion[4] in granting the preliminary injunction in favor of KBC, requiring that we vacate that injunction and, to the extent

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Indonesian court postpone proceedings); July 3, 2002 Order (enjoining Pertamina from taking substantive steps in furtherance of annulment). KBC also has filed a second motion for contempt on grounds that Pertamina has not complied with any of the court's orders, including the preliminary injunction on appeal here. KBC's Amended Second Motion for Contempt, June 11, 2002.

[2] When the court issued its preliminary injunction order, it expressly stated that both its TRO and its contempt order were superceded by this injunction, but folded many of the substantive provisions of those orders into the injunction. Nevertheless, both Pertamina and KBC separately address the validity of the contempt order. For a more complete explanation of the status of the contempt order on appeal, *see infra* Part II.D.

[3] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards [hereinafter "New York Convention"], June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (entered into force with respect to the United States, Dec. 29, 1970), *codified at* 9 U.S.C. § 201 *et seq.*

[4] *See United States v. Logan*, 861 F.2d 859, 866 n. 5 (5th Cir.1988) ("abuse of discretion is a phrase which sounds worse than it really is; it is simply a legal term of art which carries no pejorative connotations of a professional or personal nature") (citation and internal quotation marks omitted).

necessary, the district court's order holding Pertamina in contempt.

I. FACTS AND PROCEEDINGS

The origins of this dispute lie in two contracts to construct a power plant in Indonesia. Pertamina is an oil, gas, and geothermal energy company that is wholly owned by the Government of Indonesia ("GOI"). KBC is a Cayman Islands limited liability private power development company established to develop geothermal resources, including the construction and operation of electric power generating facilities.[5] In November 1994, KBC entered into two contracts with Pertamina to develop the Karaha-Bodas Geothermal Project (the "Project"), which included the building of a geothermal power plant in West Java, Indonesia. Under the first agreement, the Joint Operation Contract ("JOC"), KBC contracted with Pertamina to develop geothermal energy resources from two geothermal fields in Indonesia. In the second agreement, the Energy Sales Contract ("ESC"), KBC, Pertamina, and Pt. PLN (Persero) ("PLN"), an electric company wholly owned by the GOI,[6] agreed that Pertamina would sell the KBC-produced electricity to PLN.

In 1997, the Indonesian economy suffered during

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[5] The principal investors in KBC are two energy companies: Caithness Energy, L.L.C. ("Caithness") and FPL Energy, L.L.C. ("FPL").

[6] PLN, a party to the ESC agreement, was a respondent at the arbitration, and was originally named a respondent in the action before the district court, but was not served and has been voluntarily dismissed from the case by KBC.

the Asian financial crisis. In January 1998, after a brief suspension and a temporary restoration of the Project, the President of Indonesia issued a decree suspending the Project indefinitely as part of a national effort to stabilize the Indonesian economy. KBC declared *force majeure* and ceased performance under the contracts.

The contracts contained almost identical comprehensive consultation and arbitration clauses which required the parties to arbitrate any disputes in Switzerland pursuant to the Arbitral Rules of the United Nations Commission on International Trade Law (the "UNCITRAL Rules"). In April 1998, KBC initiated arbitration proceedings in Switzerland, claiming that Pertamina had breached the contracts. Pertamina opposed arbitration on various grounds, which included a challenge to the composition of the arbitration panel. The panel rejected those objections and proceeded to conduct a hearing on the merits in June 2000. In December 2000, the panel ruled that Pertamina and PLN had breached the contracts and awarded damages to KBC exceeding $260 million.[7]

In February 2001, Pertamina appealed the Award to the Supreme Court of Switzerland. While that appeal was pending, KBC initiated the instant proceedings in federal district court to enforce the Award. Pertamina responded by challenging enforcement on four grounds under Article V of the

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[7] The arbitration panel awarded KBC (1) $111.1 million in damages for lost expenditures; (2) $150 million in damages for loss of profits; (3) $66,655 for costs and expenses of the final phase of arbitration; and (4) 4% post-judgment interest.

New York Convention: (1) The arbitration panel was improperly composed (Article V(1)(d)); (2) the arbitration procedures were not otherwise in accordance with the agreement (Article (V)(1)(d)); (3) Pertamina was deprived of its right to present its case (Article V(1)(b)); and (4) the arbitral award violated United States public policy (Article V(2)(b)).[8] The district court denied Pertamina's motion to stay pending its appeal to the Supreme Court of Switzerland and directed the parties to proceed with summary judgment briefing. The court acknowledged, however, that it slowed the proceedings in deference Pertamina's request. The Swiss court eventually dismissed Pertamina's appeal on procedural grounds and denied its motion for reconsideration.[9] In December 2001, the district court granted KBC's motion for summary judgment (the "Judgment") to enforce the Award.

Pertamina appealed the Judgment but declined to post a supersedeas bond. In January 2002, the district court entered an order allowing KBC to commence execution of the Judgment, and the following month that court granted KBC leave to register the Judgment in New York, Delaware, and California. KBC also brought actions under the Convention in Hong Kong, Canada, and Singapore to enforce the Award in those jurisdictions.

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[8] *See* New York Convention, art. V.

[9] In April 2001, the Swiss Supreme Court dismissed Pertamina's claim because of untimely payment of costs. Pertamina moved for reconsideration, arguing that the late payment was the result of circumstances beyond Pertamina's control. In August 2001, the Swiss Federal Tribunal denied Pertamina's request for reconsideration.

In March 2002, Pertamina filed an application in the Central District Court of Jakarta to annul the Award (the "Indonesian annulment action"). Pertamina also sought an Indonesian injunction and penalties to prevent KBC from seeking to enforce the Award (the "Indonesian injunction"). The Indonesian court scheduled a proceeding for 10:00 a.m. on Monday April 1, 2002 to hear argument on the proposed injunction. In advance of the Indonesian hearing, however, KBC filed a motion in the district court on Friday, March 29, 2002, for a temporary restraining order to enjoin Pertamina from seeking injunctive relief in Indonesia. In a telephonic hearing that same evening,[10] the court determined that KBC would suffer irreparable harm if the Indonesian court issued an injunction to prevent KBC from "enforcing or executing" the Judgment. The district court orally ordered Pertamina to withdraw its application for injunctive relief at or before the hearing in the Indonesian court and to take no substantive steps in that court. The district court did not, however, prohibit Pertamina from proceeding in Indonesia entirely; rather, it prohibited Pertamina from taking any substantive steps (e.g., submitting legal arguments) but permitted Pertamina to take any ministerial steps necessary to maintain the cause of action. The court subsequently explained that it issued the TRO (1) to preserve the integrity of its judgment, which had become final and was on appeal to us without bond, and (2) to maintain the

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[10] March 29, 2002, was a legal holiday in Indonesia (Good Friday). Jakarta is 13 hours ahead of Houston (Central Standard Time). Counsel for Pertamina participated by phone.

parties' positions as they stood prior to Pertamina's initiation of the Indonesian annulment action.

Claiming that it lacked sufficient time to do so, Pertamina did not withdraw its request for injunctive relief, and the Indonesian court issued a provisional injunction prohibiting KBC from seeking to enforce the Award. Later that day, Pertamina's president-director issued a statement to the effect that Pertamina would not attempt to enforce the Indonesian court's order with respect to KBC's enforcement actions in the United States.

KBC immediately filed a motion in the district court to hold Pertamina in contempt of the TRO. Agreeing with KBC, the district court (1) again ordered Pertamina to withdraw its Indonesian application for injunctive relief against KBC, (2) found Pertamina in contempt of the TRO, and (3) ordered Pertamina to indemnify KBC for any fines resulting from the Indonesian injunction.[11] Pertamina notified the Indonesian court of the district court's order but did not request that the Indonesian court vacate or suspend its injunction as directed by the district court.

KBC next filed a motion in the district court for a preliminary injunction to prohibit Pertamina from further pursuing the Indonesian injunction and the

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[11] The district court actually issued two indemnification-like orders. It ordered Pertamina to indemnify KBC for any monetary penalties imposed by the Indonesian court, and it ordered Pertamina to pay KBC for monetary penalties imposed by any other court on the basis of the Indonesian injunction, before such payment is due.

Indonesian annulment action. In response, Pertamina filed a motion to purge the contempt order on the ground that the statement by Pertamina's president was sufficient to establish substantial compliance with the TRO. In subsequently granting KBC's motion, the district court issued seven orders: (1) It enjoined Pertamina from enforcing the Indonesian injunction; (2) it enjoined Pertamina from collecting any fine or penalty from KBC as a result of this injunction; (3) it extended the indemnification aspects of its earlier contempt order;[12] (4) it enjoined Pertamina from taking any substantive steps to prosecute the Indonesian annulment action; (5) it ordered Pertamina to advise the Indonesian court that Pertamina cannot and will not take any action to pursue the Indonesian annulment action; (6) it dissolved the provisions of the TRO and contempt order to the extent those orders differed with the preliminary injunction; and (7) it denied Pertamina's motion to purge contempt.

On May 7, 2002, Pertamina informed the Indonesian court of the district court's preliminary injunction and, pursuant to that injunction, requested the Indonesian court to suspend the proceedings indefinitely. A week later, the Indonesia court rejected Pertamina's request to suspend the litigation, in part because PLN, which was also a party to the Indonesian litigation, filed an objection to postponement, and in part because the court

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[12] The indemnification provisions of the contempt order were restated in the preliminary injunction. Although we may discuss the indemnification on its own terms, by vacating the preliminary injunction order today, we also vacate the indemnification provisions of this order.

concluded that it retained the authority to adjudicate the case.

Pertamina timely filed its notice of appeal to this court. In May 2002, we denied Pertamina's emergency motion for a partial stay of the district court's preliminary injunction. On August 27, 2002, while the matter was still under our review, the Central Jakarta District Court concluded that it had primary jurisdiction under the New York Convention and annulled the Award on grounds that it was contrary to the Convention and Indonesian arbitration law. The Indonesian court also permanently enjoined KBC from seeking to enforce the Award and imposed a fine of $500,000 for each day that KBC violated the Indonesian injunction.

In March 2003, the High Court of the Hong Kong Special Administrative Region Court of First Instance issued an order enforcing the Award in Hong Kong. Subsequently, the district court addressed Pertamina's Rule 60(b) motion to set aside judgement pursuant to our remand. The court reaffirmed its summary judgment in favor of KBC, concluding again that under the Convention the courts of Indonesia are not competent to annul the Award.

In this appeal, Pertamina argues that the district court lacked authority to issue the preliminary injunction and, in the alternative, that the court abused its discretion by doing so. Pertamina also appeals the district court's contempt order, again arguing that the district court lacked authority to enjoin Pertamina from proceeding in Indonesia and,

in the alternative, that Pertamina substantially complied with the order.[13]

II. ANALYSIS

A. STANDARD OF REVIEW

We review a district court's grant of a preliminary injunction for abuse of discretion.[14] Even though "the ultimate decision whether to grant or deny a preliminary injunction is reviewed only for abuse of discretion, a decision grounded in erroneous legal principles is reviewed *de novo*."[15]

Generally, four requirements must be met to obtain a preliminary injunction:

> (1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and (4) that granting the preliminary injunction will not disserve the

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[13] Pertamina advances the argument as well that the district court, in issuing the preliminary injunction, committed reversible error by failing to require KBC to post security to cover damages incurred by Pertamina if the injunction is found to have been improvidently granted. As we decide this case on other grounds, we need not address this argument.

[14] *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir.1985).

[15] *Women's Med. Ctr. v. Bell*, 248 F.3d 411, 419 (5th Cir.2001).

public interest.[16]

We have cautioned, however, that a preliminary injunction is "an extraordinary remedy" which should only be granted if the party seeking the injunction has "clearly carried the burden of persuasion" on all four requirements.[17] As a result, "[t]he decision to grant a preliminary injunction is to be treated as the exception rather than the rule."[18]

The dispute at issue here concerns the district court's decision to issue a foreign antisuit injunction, a particular subspecies of preliminary injunction. Although both the district court and the parties discussed all four prerequisites to the issuance of a traditional preliminary injunction, the suitability of such relief ultimately depends on considerations unique to antisuit injunctions.[19] As we conclude that the district court abused its discretion in granting the instant antisuit injunction, we need not address all the factors that generally are prerequisites to obtaining a preliminary injunction.

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[16] *Canal Auth. v. Callaway*, 489 F.2d 567, 572 (5th Cir.1974) (citations omitted).

[17] *Mississippi Power & Light Co.*, 760 F.2d at 621.

[18] *Id.*

[19] To the extent the traditional preliminary injunction test is appropriate, therefore, we only need address whether KBC showed a significant likelihood of success on the merits. The merits in this case, however, are not about whether Indonesia is an appropriate forum to litigate an annulment action, but instead whether KBC has demonstrated that the factors specific to an antisuit injunction weigh in favor of granting that injunction here.

Finally, the district court's determination of its jurisdiction to enjoin Pertamina is an issue that we review *de novo*.[20] Still, we review the district court's order holding Pertamina in contempt, to the extent it still exists, only for abuse of discretion.[21]

B. THRESHOLD MATTERS

1. *Jurisdiction*

As an initial matter, Pertamina argues that the New York Convention divests the district court of authority to enjoin a party from proceeding in a court of *primary* jurisdiction (here, Indonesia, at least according to Pertamina). The New York Convention governs the confirmation and enforcement of the Award and "mandates very different regimes for the review of arbitral awards (1) in the [countries] in which, or under the law of which, the award was made, and (2) in other [countries] where recognition and enforcement are sought."[22] Under the Convention, "the country in which, or under the [arbitration] law of which, [an] award was made" is said to have *primary* jurisdiction over the arbitration award.[23] All other signatory States are *secondary* jurisdictions, in which parties can only contest whether that State should enforce the arbitral award. The limitation of being a court of secondary jurisdiction, Pertamina contends, also deprives the

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[20] *United States v. Lynch*, 114 F.3d 61, 63 (5th Cir.1997).

[21] *F.D.I.C. v. LeGrand*, 43 F.3d 163, 166 (5th Cir.1995).

[22] *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2nd Cir.1997).

[23] New York Convention, art. V(1)(e).

district court of the competence to issue injunctive relief here.

It is well established, however, that normally "federal courts have the power to enjoin persons subject to their jurisdiction from prosecuting foreign suits."[24] Moreover, "[a]bsent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction."[25] Under the New York Convention and Chapter 2 of the Federal Arbitration Act (the Convention's implementing legislation) federal courts maintain jurisdiction to hear cases like this.[26] Although these treaty obligations limit the grounds on which the court can refuse to enforce a foreign arbitral award, there is nothing in the Convention or implementing legislation that expressly limits the inherent authority of a federal court to grant injunctive relief with respect to a party over whom it has jurisdiction. Given the absence of an express provision, we discern

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[24] *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 626 (5th Cir.1996); *see also Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1352 (6th Cir.1992); *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 35 (2nd Cir.1987); *Laker Airways Ltd. v. Sabena*, 731 F.2d 909, 926 (D.C.Cir.1984); *Seattle Totems Hockey Club, Inc. v. National Hockey League*, 652 F.2d 852, 855 (9th Cir.1981).

[25] *Califano v. Yamasaki*, 442 U.S. 682, 705, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979) (*citing Porter v. Warner Holding Co.*, 328 U.S. 395, 398, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946); *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 9-11, 62 S.Ct. 875, 86 L.Ed. 1229 (1942)).

[26] 9 U.S.C. § 203 (providing that a "proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States").

no authority for holding that the New York Convention divests the district court of its inherent authority to issue an antisuit injunction.[27]

2. *Mootness*

Guided by the constitutional command in Article III that our power extends only to actual cases or controversies, we require that an actual controversy exist at every stage in the judicial process.[28] Federal courts "may not give opinions upon moot questions or abstract propositions."[29] Thus, "if an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effectual relief whatever to a prevailing party, the appeal must be dismissed."[30] We have similarly recognized that "[a] claim becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome."[31]

KBC contends that Pertamina's appeal of the district court's April 26, 2002 preliminary injunction

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[27] We need not, and thus do not, resolve the issue whether a set of circumstances might exist under which a secondary enforcement court under the New York Convention would be justified in imposing an antisuit injunction.

[28] *In re Taylor*, 916 F.2d 1027, 1028 (5th Cir.1990).

[29] *Calderon v. Moore*, 518 U.S. 149, 150, 116 S.Ct. 2066, 135 L.Ed.2d 453 (1996) (*quoting Mills v. Green*, 159 U.S. 651, 653, 16 S.Ct. 132, 40 L.Ed. 293 (1895)).

[30] *See Church of Scientology v. United States*, 506 U.S. 9, 12, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992) (citation and internal quotation marks omitted).

[31] *Piggly Wiggly Clarksville, Inc. v. Mrs. Baird's Bakeries*, 177 F.3d 380, 383 (5th Cir.1999).

is moot because the Indonesian court granted the annulment and injunctive relief that KBC sought to prevent. We have recognized, however, that "the collateral consequences doctrine serves to prevent mootness when the violation in question may cause continuing harm and the court is capable of preventing such harm."[32] Thus, as long as there is some interest in the outcome for which effective relief is available, the case is not moot.[33]

In this case, even though KBC may not have been successful in avoiding the Indonesian court's annulment and injunction, there are aspects of both the Indonesian court's injunction and the district court's injunction that potentially could affect both parties to this dispute. When the preliminary injunction superseded and subsumed the TRO and the contempt order, it prohibited Pertamina from substantively pursuing annulment in Indonesia and from collecting any fines associated with the Indonesian injunction, and it ordered Pertamina to indemnify KBC for any penalties arising from the Indonesian injunction. Although the district court's efforts to keep Pertamina from securing an injunction in Indonesia may be moot, other aspects of the district court's preliminary injunction, particularly the portion of that order requiring indemnification, continue to give Pertamina a concrete interest in this dispute.[34] Similarly, KBC is

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[32] *Dailey v. Vought Aircraft Co.*, 141 F.3d 224, 227 (5th Cir.1998)

[33] *See id.*

[34] In addition, a second contempt motion is presently pending before the district court, this one relating to Pertamina's alleged

still potentially subject to both the fines and the penalties imposed by the Indonesian court, and therefore maintains an interest in affirming the indemnification aspects of the district court's preliminary injunction order. For these reasons, we hold that Pertamina's appeal of the preliminary injunction is not moot.

C. ANTISUIT INJUNCTION

When a preliminary injunction takes the form of a foreign antisuit injunction, we are required to balance domestic judicial interests against concerns of international comity. In assessing whether an injunction is necessary, we weigh the need to "prevent vexatious or oppressive litigation"[35] and to "protect the court's jurisdiction"[36] against the need to defer to principles of international comity. We have noted, however, that notions of comity do not wholly dominate our analysis to the exclusion of these other concerns.[37]

1. *Vexatiousness and Oppressiveness of Foreign Litigation*

In determining whether proceedings in another

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violation of this preliminary injunction and other subsequent orders enjoining Pertamina from taking substantive steps in the Indonesian action. The district court has indicated that it will not rule on the second contempt motion until we rule on the propriety of the preliminary injunction.

[35] *Kaepa, Inc.*, 76 F.3d at 627.

[36] *MacPhail v. Oceaneering Int'l, Inc.*, 302 F.3d 274, 277 (5th Cir.2002).

[37] *Kaepa, Inc.*, 76 F.3d at 627.

forum constitute vexatious or oppressive litigation, we have looked for the presence of several interrelated factors, including (1) "inequitable hardship" resulting from the foreign suit;[38] (2) the foreign suit's ability to "frustrate and delay the speedy and efficient determination of the cause";[39] and (3) the extent to which the foreign suit is duplicitous of the litigation in the United States.[40]

The district court concluded, and on appeal KBC continues to contend, that Indonesia is not a proper forum for an annulment action under the New York Convention, irrespective of Pertamina's apparently self-serving argument that Indonesia is a "primary" jurisdiction. To resolve the instant dispute, however, it is not necessary for us to address the Indonesian court's decision to issue its own injunction and to entertain an annulment action under the Convention. Several structural aspects of the New York Convention indicate that none of the factors that usually contribute to vexatiousness and oppressiveness are at play here.

When the Convention was drafted, one of its main purposes was to facilitate the enforcement of arbitration awards by enabling parties to enforce them in third countries without first having to obtain either confirmation of such awards or leave to enforce them from a court in the country of the arbitral situs.[41] Under the Convention, a court

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38 *Id.* (citation omitted).

39 *Id.* (citation and internal quotation marks omitted).

40 *MacPhail*, 302 F.3d at 277.

41 *See* Albert Jan van den Berg, *The New York Arbitration*

maintains the discretion to enforce an arbitral award even when nullification proceedings are occurring in the country where the award was rendered.[42] Furthermore, an American court and courts of other countries have enforced awards, or permitted their enforcement, despite prior annulment in courts of primary jurisdiction.[43] Here, KBC was able to

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Convention of 1958: Toward a Uniform Judicial Interpretation, at 7, 9 (1981). The antecedent Geneva Convention required an award to be final in the country were it was made before enforcement was possible in a third country, which was interpreted to mean that a court of the country of origin had to give leave to allow enforcement (also called the "double exequatur" problem). Van den Berg, at 7. The New York Convention resolved this problem by only requiring rewards to be "binding" on the parties rather than "final" in order for enforcement to occur in a court of secondary jurisdiction. *Id.* at 9; *Alghanim*, 126 F.3d at 22 (recognizing the New York Convention's change in no longer requiring recognition in the rendering state before enforcement in a court of secondary jurisdiction was possible).

[42] Article VI grants an enforcement court discretion to enforce an award even though annulment proceedings may be taking place elsewhere. New York Convention, art. VI (providing that an enforcement court "may, if it considers it proper" stay its enforcement proceedings while an annulment action takes place elsewhere). *See* Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 Yale L.J. 1049, 1071 (1961) (explaining that as a "reasonable complement to Article V(1)(e)" Article VI is "wholly discretionary, and the enforcing State is free to refuse adjournment and to enforce the award, nullification proceedings in the rendering State notwithstanding").

[43] *See Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F.Supp. 907, 909-13 (D.D.C.1996) (enforcing an arbitral award made in Egypt despite annulment of the award by Egyptian courts, in part because Article V only makes refusal to enforce discretionary, and in part because Article VII enables a

initiate proceedings in a secondary jurisdiction (the United States) to enforce the Award before a court of primary jurisdiction (Switzerland) had ruled on Pertamina's appeal of the Award.

By allowing concurrent enforcement and annulment actions, as well as simultaneous enforcement actions in third countries, the Convention necessarily envisions multiple proceedings that address the same substantive challenges to an arbitral award. For instance, Article (V)(1)(d) enables a losing party to challenge enforcement on the grounds that the arbitral panel did not obey the law of the arbitral situs, i.e., the *lex arbitri,* even though such a claim would undoubtedly be raised in annulment proceedings in the rendering State itself. In addition, this case illustrates that enforcement proceedings in multiple secondary-jurisdiction states can address the same substantive issues. As noted, in addition to the U.S. proceeding, KBC has initiated enforcement actions in Canada and Singapore, and has already secured enforcement in Hong Kong. Although KBC contends that other courts will give *res judicata* effect to U.S. enforcement, the recent decision of the High Court of the Hong Kong Special Administrative Region Court of First Instance demonstrates that other enforcement courts can and sometimes do conduct

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secondary jurisdiction to enforce an award if allowed by its domestic law). *See also* Domenico Di Pietro and Martin Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958,* at 169-70 (2001) (discussing a court's discretion to enforce an award despite annulment elsewhere and listing several examples of the exercise of such discretion in other national courts).

their own independent analyses of substantive challenges to the enforcement of the foreign award.[44] In short, multiple judicial proceedings on the same legal issues are characteristic of the confirmation and enforcement of international arbitral awards under the Convention.

Another important aspect of the New York Convention is its assigning of different roles to national courts to carry out the aims of the treaty. Articles IV and V of the Convention specify the procedures for courts of secondary jurisdictions to follow when deciding whether to enforce a foreign arbitral award. Article IV provides that a party can obtain enforcement of its award by furnishing to the putative enforcement court the authenticated award and the original arbitration agreement (or a certified copy of both).[45] Article V, in turn, enumerates specific grounds on which the court *may* refuse enforcement if the party contesting enforcement provides proof sufficient to meet one of the bases for refusal.[46]

In contrast to the limited authority of secondary-jurisdiction courts to review the arbitral award, courts of primary jurisdiction, usually the courts of the country of the arbitral situs, have much broader discretion to set aside an award. By its silence on the

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[44] *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* (High Court of the Hong Kong Special Administrative Region Court of First Instance, March 27, 2003) [hereinafter "Hong Kong decision"].

[45] New York Convention, art. IV(1).

[46] Art. V.

matter, the Convention does not restrict the grounds on which primary-jurisdiction courts may annul an award, thereby leaving to a primary jurisdiction's local law the decision whether to set aside an award.[47] Consequently, even though courts of a *primary* jurisdiction may apply their own domestic law when evaluating an attempt to annul or set aside an arbitral award, courts in countries of *secondary* jurisdiction may refuse enforcement only on the limited grounds specified in Article V.[48]

When we take into consideration these features of the New York Convention, we see that none of the factors that support antisuit injunctions are strong here. First, as the Convention already provides for multiple simultaneous proceedings, it is difficult to envision how court proceedings in Indonesia could amount to an inequitable hardship. Not only did KBC contract to arbitrate its dispute in a foreign country (Switzerland), but it also instituted enforcement proceedings in several countries, including the United States. Indeed, but for

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[47] Di Pietro, at 169 (explaining that by failing to restrict the grounds for setting aside an award in the rendering State, the Convention left the matter to that State's domestic law, a problem described as the "anathema of local particularities"); Quigley, at 1070 (explaining that one reason the Convention failed to establish grounds for annulment in a rendering State is that it would have been considered "meddling with national procedure for handling domestic awards").

[48] *Alghanim*, 126 F.3d at 23. As described *infra*, however, enforcement courts do maintain discretion to enforce an award despite annulment elsewhere. Furthermore, although a primary jurisdiction maintains more bases on which to set aside an award, several likely track the grounds provided for in Article V.

Pertamina's initiation of a law suit in Indonesia, or perceived bias there, KBC conceivably might have attempted enforcement there as well.

It is also uncertain whether the financial hardship about which KBC complains will ever materialize. The Indonesian injunction imposes fines of $500,000 per day on KBC for as long as it pursues enforcement of the award. In challenging the contempt order in district court, however, Pertamina indicated, based on advice from Indonesian counsel, that the injunction is unenforceable until Pertamina seeks permission from a higher Indonesian court to enforce it; and Pertamina has promised the district court that it will not pursue enforcement of the Indonesia injunction. Even if Pertamina were to initiate proceedings to enforce this financial penalty, and the Indonesian court were to fine KBC for its enforcement efforts *outside* of Indonesia,[49] it is anything but clear that this would cause KBC financial hardship: There is no record evidence that KBC has substantial assets in Indonesia.

Although it is always possible for Pertamina to pursue enforcement of the fines in third countries, it seems extremely unlikely that any country would countenance such a claim, given Pertamina's dubious

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[49] Pertamina has also introduced into the record its Indonesian legal counsel's opinion that the Indonesian court injunction only concerns KBC's attempts to enforce the arbitral award in Indonesia, not its actions elsewhere in the world, because as a general rule injunctions issued by Indonesian court do not have extraterritorial effect.

behavior throughout this process.[50] Furthermore, even if KBC should have substantial assets in Indonesia, it is arguable that Pertamina would have found another reason to convince Indonesian courts to seize those assets. Pertamina could have sought monetary relief in the Indonesian courts regardless of the basis for KBC's claims elsewhere, and Indonesian courts, if truly determined to protect Pertamina at any cost, likely would have been willing to grant the relief requested. Nevertheless, as a court of secondary jurisdiction under the New York Convention, charged only with enforcing or refusing to enforce a foreign arbitral award, it is not the district court's burden or ours to protect KBC from all the legal hardships it might undergo in a foreign country as a result of this foreign arbitration or the international commercial dispute that spawned it.

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[50] When KBC first attempted to enforce its award in the district court, Pertamina requested that the district court stay the proceedings pending the outcome of Swiss court proceedings. In making this request, as well as in other submissions to the district court, Pertamina continuously represented to the district court that Swiss arbitral law governed the arbitration. Indeed, the district court admitted that it partially relied on these representations when it slowed the enforcement proceedings. Pertamina also apparently made similar representations to the arbitral panel itself. Only after Swiss courts had dismissed Pertamina's appeals, and the district court enforced the award in favor of KBC, did Pertamina file suit in Indonesian court. Regardless of its reasons for the delay, its complete silence as to its ability to file in Indonesian court (based on the applicability of Indonesian arbitral law) throughout the span of litigation, is certainly sufficient grounds to find Pertamina's behavior dubious and somewhat deceptive. Whether or not the Indonesian court is a proper forum, Pertamina implied more than once that Swiss law was the applicable arbitral law in this dispute.

Second, there is little evidence that the Indonesian injunction or annulment action will "frustrate and delay the speedy and efficient determination of the cause."[51] Although it may occasion some temporary delay, an Indonesian annulment is wholly ineffective in curtailing the ability of any court of secondary jurisdiction, including U.S. courts, to enforce the arbitral award. As an enforcement jurisdiction, our courts have discretion under the Convention to enforce an award despite annulment in another country, and have exercised that discretion in the past.[52] The discretion to enforce in this case is even more well-founded, as a Swiss court with indisputable primary jurisdiction under the Convention has already dismissed Pertamina's challenge to the Award. Furthermore, even though an Indonesian annulment may force secondary-jurisdiction courts to consider that judgment in deciding whether to enforce the Award, they nonetheless must undertake an enforcement analysis. This slight additional expenditure of judicial resources seems inconsequential, as annulment is only one of several grounds on which recognition and enforcement may be refused;[53] and

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[51] *Kaepa, Inc.*, 76 F.3d at 627 (citation and internal quotation marks omitted).

[52] *Chromalloy Aeroservices*, 939 F.Supp. 907.

[53] *See* New York Convention, art. V(1) (other bases for refusing enforcement include, *inter alia*, that (1) the parties were under some incapacity, or the agreement was not valid under the arbitral law chosen by the parties or the law of the country where the award was made; (2) the party against whom the award is invoked was given insufficient notice of the arbitration proceedings or was unable to present his case; (3)

some of these grounds have already been raised by Pertamina in the district court as well as in the enforcement proceeding in Hong Kong.[54]

Third, the duplication inherent in the Indonesian proceedings is less problematic than it might be otherwise, as the Convention already allows for multiple proceedings addressing the same or similar legal bases against enforcement and confirmation. Additionally, to any extent that the Indonesian courts might be acting as legitimate courts of primary jurisdiction, such courts would have domestic law grounds on which to analyze the propriety of a foreign arbitral award, but which, under the Convention, may not be relied on by enforcement courts in other States. Thus, assuming *arguendo* that the Indonesian courts might somehow be deemed to be courts of primary jurisdiction, they still would not precisely duplicate the enforcement proceedings that took place in the United States.

Finally, the Indonesian court proceedings do not threaten the integrity of the district court's jurisdiction or its Judgment enforcing the Award. As courts of secondary jurisdiction here, the authority of

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the award contains decisions on matters that go beyond the scope of the submission to arbitration; and (4) the composition of the arbitral authority or the arbitral procedure violated the agreement of the parties or the law of the country where the arbitration took place). Even though many of these reasons may have no basis of fact in this dispute, they nonetheless constitute arguments that an enforcement court may very well have to confront in its proceedings.

[54] *Karaha Bodas Co.*, 190 F.Supp.2d at 945-957; *Hong Kong Decision*, (High Court of the Hong Kong Special Administrative Region Court of First Instance, March 27, 2003).

U.S. courts is restricted to enforcing or refusing to enforce the arbitral award under the Convention. The district court has chosen to enforce the Award, and the Indonesian annulment only has an effect here to the extent that our courts chose to recognize it. Thus, the integrity of our jurisdiction and the district court's judgment will not be affected unless we decide that the Indonesian annulment is in fact valid *and* that this annulment outweighs the Swiss court's confirmation of the Award. Otherwise, under the Convention, we maintain the discretionary authority to ignore the Indonesian proceedings and affirm the district court's decision to enforce the Award here. Furthermore, the integrity of the district court's decision vis-à-vis other secondary enforcement jurisdictions is not harmed, as these courts are prone to conduct their own independent enforcement analyses anyway. Hong Kong's recent decision to enforce the Award not only supports this conclusion, but also illustrates that an Indonesian court's annulment fails to jeopardize enforcement of the Award elsewhere as well.[55]

2. *Interests in International Comity*

Balanced against the scant vexatiousness and oppressiveness of Pertamina's acts are the not-insubstantial interests in preserving international comity. Neither a matter of legal obligation nor of mere courtesy, comity has long counseled courts to give effect, whenever possible, to the executive,

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[55] *See Hong Kong decision* (stating that "the fact that the court in Indonesia has now annulled the award under its own law is also a matter which has no effect on this court's task").

legislative and judicial acts of a foreign sovereign so as to strengthen international cooperation.[56] The doctrine of comity contains a rule of "local restraint" which guides courts reasonably to restrict the extraterritorial application of sovereign power.[57] In this vein, we have impliedly recognized the importance of comity when a case implicates public international issues and when prior steps in resolving a dispute have taken place in international fora.[58] The immediate issue in this case is whether an injunction, which effectively attempts to arrest the judicial proceedings of another foreign sovereign-here, Indonesia-sufficiently upsets our interests in preserving comity among nations.

The district court concluded that its injunction did not "impinge on another court's jurisdiction or

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[56] *Hilton v. Guyot*, 159 U.S. 113, 163-64, 16 S.Ct. 139, 40 L.Ed. 95 (1895) (describing comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws").

[57] Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 Am. J. Int'l L. 280, 281 (1982). *See also Restatement (Third) of Foreign Relations*, § 403, rptr's n. 2 (1987) (stating that courts have invoked "comity" in "approaching challenges to the reach of United States jurisdiction to prescribe").

[58] *See Kaepa, Inc.*, 76 F.3d at 627 (finding no threat to interstate relations, and thus no need to defer to notions of comity, when "no public international issue is implicated," and when "the dispute has been long and firmly ensconced within the confines of the United States judicial system").

cause comity concerns," because it had already issued a final judgment, thereby minimizing the reason to defer to proceedings elsewhere, and because Indonesia was not a proper court of primary jurisdiction under the Convention. The district court reasoned that, in fact, it was the Indonesian action that upset comity by permitting the relitigation of issues already decided by the district court, thereby threatening to erode the effectiveness of the district court's judgment, both here and abroad.

We agree that there is strong evidence in this instance favoring Switzerland as the paramount country of primary jurisdiction under the Convention. The district court and the Hong Kong Court of First Instance suggest at least three potential bases for finding that Swiss law effectively constitutes the *lex arbitri* of this case: (1) Pertamina previously argued in favor of Swiss arbitral law, which may reveal the parties' original contractual intentions to apply Swiss law in arbitration; (2) the parties failed clearly to choose Indonesian arbitral law in their agreement, as may be required by international law when parties want to select an arbitral law other than that of the arbitral situs; and, finally, (3) Pertamina may be judicially estopped from arguing otherwise because it contended strenuously in the district court, proffering arguments on which the court relied, that Swiss arbitral law applies to this dispute. Whether Switzerland is the only country of primary jurisdiction (and, impliedly, whether Indonesia could be a proper forum for annulment), however, is an issue that is not directly before us today. That issue arises under Article V of the Convention as a defense

to enforcement, which the district court decided earlier, and which was on separate appeal before another panel of this Court and thereafter before the district court on remand.

Nevertheless, even if the Indonesian court acted wrongly in its decision to annul the Award as a purported court of primary jurisdiction under the New York Convention, we need not directly address the propriety of that court's injunction and annulment. Contrary to the district court's conclusions, legal action in Indonesia, regardless of its legitimacy, does not interfere with the ability of U.S. courts, or courts of any other enforcement jurisdictions for that matter, to enforce a foreign arbitral award. Furthermore, as we have explained, the "relitigation" of issues is characteristic of the Convention's confirmation and enforcement scheme. Lastly, the district court's "final judgment" is not truly a decision on the merits; rather, it is an order to enforce an award resulting from litigation elsewhere, which is not necessarily given *res judicata* effect in foreign jurisdictions.[59]

This case also differs significantly from *Kaepa,* in

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[59] Proceedings in multiple jurisdictions normally should be allowed at least until judgment is reached in one, at which point *res judicata* can be pleaded in the other. *Laker Airways Ltd. v. Sabena,* 731 F.2d 909, 926-27 (2d Cir.1984). The implication of this principle is that comity concerns diminish once a final judgment has been reached in one court. *See id.* at 928. This rule-of-thumb is inapplicable here, however, where the U.S. court acts merely as a secondary-jurisdiction court under the Convention; it only enforces, or refuses to enforce, awards arbitrated elsewhere, and those decisions do not automatically receive *res judicata* effect.

which we found comity concerns insignificant because that case dealt with a contractual dispute between private parties and was "long and firmly ensconced within the confines of the United States judicial system."[60] Unlike the foreign litigation at issue in *Kaepa,* this case implicates public international issues and has been litigated chiefly in non-American fora.

The instant dispute implicates three public international issues. First, this is not a purely private dispute, as Pertamina is wholly owned by the GOI, and the claims at issue in the arbitration arose from sovereign acts of that government. Second, even if Pertamina is acting in bad faith by pursuing annulment in Indonesia (as it appears to be), the district court's attempt to enjoin Pertamina effectively translates into an attempt to enjoin the Indonesian court itself and to interfere with the sovereign actions of the GOI.[61] When viewed in a vacuum, enjoining Pertamina might appear to be the right answer in this case; but when viewed in total context, its effect tends to clash with the general

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[60] 76 F.3d at 627.

[61] We recognize that the district court was familiar with its role under the New York Convention, and was attempting only to thwart the actions of Pertamina and not Indonesia courts generally. Nonetheless, after review of the record and the Indonesian court's holdings, we conclude that an attempt to enjoin Pertamina has the undeniable effect, even if unintended, of an attempt to enjoin the courts of Indonesia themselves. *See Donovan v. City of Dallas,* 377 U.S. 408, 413, 84 S.Ct. 1579, 12 L.Ed.2d 409 (1964) (citations omitted) (indicating that an injunction issued at a party does not avoid the tension such an injunction creates with the other court exercising jurisdiction over that party).

principle that a sovereign country has the competence to determine its own jurisdiction and grant the kinds of relief it deems appropriate.

Third, and perhaps most importantly, allowing such an injunction to stand could set an undesirable precedent under the Convention, permitting a secondary jurisdiction to impose penalties on a party when it disagrees with that party's attempt to challenge an award in another country. It is at least conceivable that by using the district court's decision as persuasive authority, an enforcement court in a future dispute might attempt to enjoin proceedings in countries with arguable primary jurisdiction, or in countries with clear primary jurisdiction but with which the enforcement country's court radically disagrees. Reaching out to enjoin proceedings abroad cuts against the Convention's grants of separate and limited roles of primary-jurisdiction courts to annul awards, and of secondary-jurisdiction courts to enforce, or refuse to enforce, awards in their own countries.[62] In sum, an injunction here is likely to have the practical effect of showing a lack of mutual respect for the judicial proceedings of other sovereign

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[62] As the Supreme Court has indicated, "[t]he utility of the Convention in promoting the process of international commercial arbitration depends upon the willingness of national courts to let go of matters they normally would think of as their own." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 639, n. 21, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). Even though the *Mitsubishi* court was primarily addressing the arbitrability of disputes raising anti-trust issues, its guidance nevertheless still applies here, where exercise of a court's traditional equitable power threatens to upset the Convention's assignment of limited, distinct roles to national courts in the confirmation and enforcement process.

nations and to demonstrate an assertion of authority not contemplated by the New York Convention.

In addition, the procedural chronology of this case illustrates the inherently international character of the proceedings themselves. This case (1) arises from contracts negotiated and allegedly breached in Indonesia, (2) was arbitrated and litigated originally in Switzerland, and, (3) involves primarily non-United States parties. Although enforcement of the Award in the United States may well satisfy much or even all of KBC's claim, our courts are nonetheless courts of secondary jurisdiction, empowered only to enforce or refuse to enforce the foreign award, and then only within the United States. Thus, the courts of this country do not maintain nearly as meaningful an interest in the resolution of this dispute, other than to give effect to a foreign arbitral award, as they do in the great majority of the cases they hear.

It is true that Pertamina is likely in the wrong here, and that Indonesia's injunction and annulment may violate comity and the spirit of the Convention much more than would the district court's injunction. In reality, however, a U.S. court's injunction is powerless to prevent or terminate such foreign actions. The Convention already appears to allow for some degree of forum shopping[63] and, as with many

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[63] *See* Quigley, at 1070 (finding that Article V.2(a)-enabling an enforcement court to refuse recognition and enforcement if the subject matter of the dispute is not amenable to settlement by arbitration under the arbitration law of the enforcement country-grants parties who succeeded in arbitration a certain degree of forum-shopping when choosing where to enforce the award).

treaties, the efficacy of the Convention depends in large part on the good faith of its sovereign signatories.[64] Upholding the district court's injunction could only further exacerbate the problem, diplomatically if not legally as well.

3. *Summary*

Although Indonesia has already purported to annul the Award, such annulment in no way affects the authority of the district court (or this court) to enforce the Award in the United States-which is, after all, the principal task of a U.S. court under the Convention. And, the Award can be enforced here with or without the district court's injunction against Pertamina. Similarly, other enforcement jurisdictions will be forced independently to weigh the Indonesian annulment with or without awareness of a U.S. court's injunction. Inasmuch as the Convention provides for multiple proceedings and a more limited role for enforcement jurisdictions, Pertamina's actions in Indonesia, even if spurious, are less vexatious and oppressive than they would be outside of this treaty structure. Finally, given the absence of a practical, positive effect that any injunction could have, more weighty considerations of comity dictate that the better course for U.S. courts to follow is to avoid the appearance of reaching out to interfere with the judicial proceedings in another country and to avoid stepping

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[64] *See id.* (arguing that an enforcement country's authority in Article V.2(b) to refuse enforcement if contrary to its public policy "has the effect of relegating the ultimate decision on the efficacy of the Convention to the good faith of the Contracting States").

too far outside its limited role under the Convention.

D. THE CONTEMPT ORDER

Although the district court denied Pertamina's motion to purge contempt, it expressly held that the TRO and contempt order were "superceded by th[e] preliminary injunction, and all restraints not expressly set forth in [the injunction were] dissolved." Given this pronouncement, the only district court order that should be subject to review on appeal to us is the preliminary injunction. By reversing and vacating the preliminary injunction, we addressed the substantive provisions of the contempt order, most importantly the indemnification provisions, that were included in the injunction, thereby making it unnecessary for us to address now the contempt order itself. Nevertheless, because the parties chose to focus separately on the contempt order, and because we want to make clear that no part of the contempt order remains valid, we briefly address the contempt order as well.

In *United States v. United Mine Workers of America,* the Supreme Court held that even though *criminal* contempt orders endure if the injunction on which they are based is vacated or found moot, "[t]he right to remedial relief [through a *civil* contempt order] falls with an injunction which events prove was erroneously issued."[65] We and several other

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[65] 330 U.S. 258, 294-95, 67 S.Ct. 677, 91 L.Ed. 884 (1947) ("It does not follow, of course, that simply because a defendant may be punished for criminal contempt for disobedience of an order later set aside on appeal, that the plaintiff in the action may

circuits have expressly adopted this rule.[66]

Given the rule's clarity, the only remaining question is whether the contempt order that the district court imposed on Pertamina is civil or criminal. The Supreme Court has indicated that "[i]t is not the fact of punishment but rather its character and purpose that often serve to distinguish civil from criminal contempt."[67] Thus, we have stated that "[t]he test for determining the civil or criminal nature of a contempt order is the apparent purpose of the trial court in issuing the contempt judgment."[68] When the purpose is punitive or the injunction is "designed to vindicate the authority of the court," the contempt order is criminal, but when the court is

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profit by way of a fine imposed in a simultaneous proceeding for civil contempt based upon a violation of the same order.").

[66] *United States Steel Corp. v. United Mine Workers*, 519 F.2d 1236, 1249 (5th Cir.1975) (recognizing and applying the rule that "disobedience of a void preliminary injunction does not carry civil contempt penalties"). *See also Klett v. Pim*, 965 F.2d 587, 590 (8th Cir.1992) (finding that "[c]ompensatory civil contempt does not survive if the underlying injunction is vacated because it was issued erroneously"); *Hampton Tree Farms, Inc. v. Yeutter*, 956 F.2d 869, 871 (9th Cir.1992) (finding that "once an injunction in a civil case has been invalidated, rights granted under the injunction no longer exist and cannot be enforced"); *Blaylock v. Cheker Oil Co.*, 547 F.2d 962, 966 (6th Cir.1976) (recognizing and applying from *United Mine Workers* rule); *Latrobe Steel Co. v. United Steelworkers*, 545 F.2d 1336, 1345 (3d Cir.1976) (affirming rule that "compensatory civil contempt does not survive the abrogation of the underlying decree").

[67] *Shillitani v. United States*, 384 U.S. 364, 369, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966) (citation and internal quotation marks omitted).

[68] *In re Hunt*, 754 F.2d 1290, 1293 (5th Cir.1985).

coercive or remedial in its purpose, the order is civil.[69]

In the instant case, the district court expressly held Pertamina to be in civil contempt of court. In addition, although the district court was motivated to maintain the status quo and protect its own authority, the express commands of the contempt order were directed at shepherding Pertamina's future actions, not necessarily punishing it for past misbehavior: (1) The order directed Pertamina's counsel to withdraw the application for injunctive relief that was pending before the Indonesian court; (2) it directed Pertamina to request that the Indonesian courts vacate any court-ordered injunctive relief; (3) it directed Pertamina to indemnify KBC for any future monetary penalties imposed by Indonesian court; (4) it declared that KBC has no obligation to pay Pertamina any penalties that might be imposed by Indonesian courts; and (5) it ordered Pertamina to pay KBC for fines imposed by any other court because of KBC's violation of the Indonesian court injunction and to do so before KBC's payment is due to such courts. In short, most, if not all, of the penalties imposed on Pertamina by the district court's contempt order were meant to coerce Pertamina to end all actions in Indonesian courts and refrain from acting on any decrees of those courts.[70] As best we can tell, Pertamina's apparent failure to stop the Indonesian proceedings never resulted in immediate monetary

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[69] *Id.* (citation and internal quotation marks omitted).

[70] The Preliminary Injunction Order substantially repeated the demands upon Pertamina.

penalties against KBC.

The obvious purpose of the district's court's contempt order was to constrain Pertamina to comply with the court's substantive orders rather than to punish Pertamina for any past misconduct. Coupled with the district court's express civil label, these particular aspects of the contempt order satisfy us that it is truly civil in character, which requires us to vacate that order, to the extent it still persists, along with the preliminary injunction, as dictated by the criminal/civil dichotomy of *United Mine Workers.*[71]

III. CONCLUSION

We empathize with the district court and share its frustrations at the acts of Pertamina and its counsel. For the foregoing reasons, however, we are constrained to reverse the district court and vacate the preliminary injunction and, as necessary, the contempt order against Pertamina.

REVERSED; PRELIMINARY INJUNCTION (and ORDER OF CONTEMPT) VACATED.

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[71] 330 U.S. at 294-95, 67 S.Ct. 677.

APPENDIX F

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

IN THE MATTER OF AN ARBITRATION BETWEEN ARAHA BODAS COMPANY, L.L.C.,
Petitioner,

v.

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA,
Respondent.

CIVIL ACTION NO. H-01-0634

May 30, 2003

MEMORANDUM AND ORDER

This matter is before the Court on Perusahaan Pertambangan Minyak Dan Gas Bumi Negara's ("Pertamina's") Motion to Set Aside Judgment Under Fed. R. Civ. P. 60(b) ("Rule 60(b) Motion") [Doc. # 208].[1] Pertamina asks the Court to vacate its

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[1] *See* Pertamina's Memorandum in Support of its Motion to Set Aside Judgment Under Fed. R. Civ. P. 60(b) [Doc. # 209], and documentary exhibits and authorities [Doc. # 211] and expert reports [Doc. # 212] in support thereof; KBC's Memorandum in Opposition to Pertamina's Motion to Set Aside

December 4, 2001 Judgment ("Final Judgment") granting summary judgment to Karaha Bodas Company, L.L.C. ("KBC") and confirming the award of an international arbitration tribunal ("Tribunal") of more than $260 million to KBC ("Arbitral Award"). Pertamina filed its current motion pursuant to Federal Rule of Civil Procedure 60(b) almost a year after filing its Notice of Appeal from the Final Judgment. The Fifth Circuit has remanded the case to this Court for the limited purpose of determining the merits of the Rule 60(b) Motion.

Pertamina's 60(b) Motion has three parts: (1) a request for relief from this Court's December 4, 2001 Final Judgment under Rule 60(b)(2) based on newly discovered evidence, namely, the existence of political risk insurance coverage for the investment in the Project pursuant to which certain KBC investors were paid $75 million; (2) a request for relief from the December 4, 2001 Final Judgment under Rule 60(b)(5) because the Central Jakarta District Court annulled the underlying Arbitral Award on August 27, 2002; and, alternatively, (3) a request that the December 4, 2001 Final Judgment be deemed satisfied to the extent of the $75 million dollar insurance payment. This Court partially denied Pertamina's Rule 60(b) Motion to the extent it sought

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Judgment [Doc. # 220]; Pertamina's Reply Memorandum in Support of its Motion to Set Aside Judgment Under Fed. R. Civ. P. 60(b) [Doc. # 231], and expert reports [Doc. # 232] in support thereof; KBC's Sur-Reply to Pertamina's Motion to Set Aside Judgment Under Fed. R. Civ. P. 60(b) [Doc. # 239]; and Pertamina's Rebuttal Memorandum in Support of its Motion to Set Aside Judgment Under Fed. R. Civ. P. 60(b) [Doc. # 240].

relief based on the Indonesian annulment by its Memorandum and Order issued April 16, 2003 [Doc. # 247]. Having considered the parties' voluminous submissions, all matters of record, and applicable legal authorities, the Court now **denies** the remainder of Pertamina's Rule 60(b) Motion related to "new" evidence of a political risk insurance policy under which certain KBC investors were paid $75 million.

I. BRIEF FACTUAL AND PROCEDURAL BACKGROUND

This Court has issued several written decisions in this case and will not repeat the factual background of this case on detail here.[2] Briefly, this matter arises out of contracts between Pertamina and KBC for the construction and operation of an electrical power plant in Indonesia (the "Project"). The parties executed two contracts, the Joint Operation Contract ("JOC") and Energy Sales Contract ("ESC"), both of which contained an arbitration clause calling for arbitration of disputes under the Arbitral Rules of the United Nations Commission on International Trade ("UNCITRAL"). After the Project was suspended by the government of Indonesia, KBC initiated arbitration proceedings. The parties

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[2] For more detailed background information, *see* Memorandum and Order issued November 30, 2001 granting summary judgment in favor of KBC [Doc. # 45]; Memorandum and Order issued April 26, 2002 granting an injunction against Pertamina [Doc. # 137]; Memorandum and Order issued April 16, 2003 denying in part Pertamina's Rule 60(b) Motion [Doc. # 247].

participated in an arbitration in Geneva, Switzerland, which resulted in the December 2000 Arbitral Award of over $260 million in favor of KBC. The issue currently before the Court involves a "political risk" insurance policy pursuant to which certain KBC investors were paid $75 million.[3] Pertamina contends that this insurance policy was responsive to its arbitration discovery request for any documents showing what consideration KBC and its investors, specifically FPL Energy ("FPL") and Caithness, gave to providing the $500 million financing necessary for the Project, and for all documents they considered in making their financing decisions.[4] KBC refused to agree to Pertamina's requested discovery. The Tribunal deferred ruling on the discovery dispute until the conclusion of the merits hearing. At the merits hearing, Robert McGrath, Treasurer of the FPL Group, of which FPL is a subsidiary, testified regarding FPL's willingness to finance the project. When questioned by a member of the Tribunal as to as to whether the Project was protected by "OPIC political risk insurance,"[5]

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[3] The named insureds on the policy at issue are Karaha Bodas Investment Company, Caithness Indonesia Power Partners LP, Caithness Energy L.L.C., and Duval Corporation. FPL is not a named insured. Ex. 58 to Pertamina's Reply, Policy No. 97BPL2126.

[4] *See* Schedule to Pertamina's May 16, 2000 submission to the Tribunal, Ex. 22 to Pertamina's Rule 60(b) Motion.

[5] "OPIC," the Overseas Private Investment Corporation, is a United States government sponsored entity that provides political risk insurance. KBC's Opposition, at 5; Ex. D to Pertamina's Rule 60(b) Motion, Expert Report of Daniel R. Coquillette ("Coquillette Report"), ¶ 18 n. 1. Pertamina was aware at the time of aribitration that other similar projects, known as Himpurna and Patuha Power, in which PLN, the

McGrath testified "I am not sure of that. I know there was some discussions at the time, but I don't recollect as to whether it was or wasn't." Arb. Tr. 453:17-21. A primary basis for Pertamina's motion is that this statement misled the Tribunal into concluding that there was in fact no political risk insurance of any kind for the Project.

At the conclusion of the arbitration hearing on the merits of KBC's claims, the Tribunal asked whether the parties desired a decision from the Tribunal on the stayed discovery requests. Arb. Tr. 807:2-17. In response, counsel for Pertamina and PLN stated that he was prepared to rest on the record as it stood, saying "[o]ur request went to the purported ... financing that would have been made available and other things, and I think the record on that has been fully made. I am prepared to rest on that record, and so I think the discovery requests should no longer be in the picture." Arb. Tr. 807:2-808:13. Further, counsel for Pertamina commented "this has gone very nicely and the Tribunal has done a marvelous job." Arb. Tr. 814:11-13.

Pertamina contends that it first became aware of the possible existence of the insurance policy from an article in a Jakarta newspaper in July 2002, and confirmed its existence through limited discovery allowed by a Canadian court in a proceeding by KBC to enforce the Award. Pertamina therefore argues that it made this Motion as soon as possible upon

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Indonesian state-owned oil company, was involved were covered by OPIC insurance.

discovery of the new evidence. KBC points out, in contravention of those representations, that KBC's Certificate of Interested Persons filed in this case March 8, 2001, disclosed several Lloyd's Syndicates as having a financial interest in the litigation and should have alerted Pertamina to the existence of the policy at issue.[6]

II. LEGAL STANDARDS

Rule 60(b)(2) provides for relief from judgment on the basis of newly discovered evidence where the movant shows "that the evidence was discovered following the trial, that he used due diligence to discover the evidence at the time of the trial, that the evidence is not merely cumulative nor impeaching, that it is material, and that a new trial in which the evidence was introduced would probably produce a different result." *Government Fin. Servs. v. Peyton Place, Inc.*, 62 F.3d 767, 771 n. 10 (5th Cir. 1995) (quoting *Chilson v. Metropolitan Transit Auth.*, 796 F.2d 69, 72 (5th Cir. 1986)).

The judgment from which Pertamina seeks relief grants KBC summary judgment for enforcement of its Arbitral Award. KBC's motion was governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958 (the "New York Convention"), codified at 9 U.S.C. § 201 *et seq.* Thus, in order to be entitled to relief, Pertamina must show that the insurance policy would have

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[6] *See* Certificate of Interested Persons dated March 8, 2001 [Doc. # 4].

created a genuine issue of material fact on one of the defenses to enforcement of the Arbitral Award recognized by the New York Convention. Pertamina argues that KBC's failure to produce the insurance policy in the arbitration shows that it was prevented from presenting its case within the meaning of Article V(1)(b) of the Convention, and that KBC's withholding of the policy violated its "duty of candor to the Tribunal" and is contrary to United States public policy, thus supporting a defense to enforcement under Article V(2)(b) of the Convention. Pertamina further argues that the existence of the policy underscores that it should have been granted discovery before entry of summary judgment in this case.

III. ANALYSIS

A. "Newly Discovered Evidence"

A few preliminary points are appropriate before addressing the major arguments briefed by the parties. Pertamina argues that the Fifth Circuit, by its *Per Curiam* Order remanding this case, intended to suggest that the insurance policy is newly-discovered evidence under Rule 60(b).[7] The Court disagrees. To the contrary, had the Court of Appeals had such a view, it would have explicitly so ruled. The Court interprets the remand order to allow this

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[7] The remand was for the limited purpose of "determin[ing] the impact of Pertamina's newly discovered evidence of the existence of political risk insurance coverage on the judgment confirming the arbitration award." Order in Appeal No. 02-20042 dated March 5, 2003, at 13-14.

Court to make its own determinations on all the issues presented in the Rule 60(b) Motion.

In any event, the Court assumes the existence of the insurance is "newly discovered" evidence and considers Pertamina's arguments on their merits. While there are serious questions about whether Pertamina lacked notice of the insurance once KBC commenced this case, this issue involves a fact-intensive inquiry that is unnecessary to resolution of the pending motion. Thus, the Court does not reach KBC's contention that Pertamina's Rule 60(b) Motion is not based on "newly discovered" evidence.

B. Article V(1)(b) - Due Process

The New York Convention provides for denial of confirmation of an arbitral award if the party against whom it is invoked can prove that it "was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case." 9 U.S.C. § 201, Art. V(l)(b). This enumerated defense "essentially sanctions the application of the forum state's standards of due process." *Iran Aircraft Indus. v. AVCO Corp.*, 980 F.2d 141, 145-46 (2d Cir. 1992). The fundamental requirement of due process is the opportunity to be heard at a "meaningful time and in meaningful manner." *Id.* at 146. Enforcement of the award may be denied only if there was a procedural infirmity that rendered the proceedings fundamentally unfair and caused prejudice to the complaining party. *Compagnie Des Bauxites De Guinee v. Hammermills, Inc., No.* 90-0169,1992 WL 122712, *5 (D.D.C. May 29, 1992). A fundamentally

fair hearing is one that meets the minimum requirements of fairness: adequate notice, a hearing on the evidence, and an impartial decision by the arbitrators. *See Generica Ltd. v. Pharm. Basics,* 125 F.3d 1123, 1130 (7th Cir. 1997); *Sunshine Mining Co. v. United Steelworkers,* 823 F.2d 1289, 1295 (9th Cir. 1987). The right to due process does not, however, encompass all the detailed procedural rights set forth in the Federal Rules of Civil Procedure. *Imperial Ethiopian Gov't v. Baruch-Foster Corp.,* 535 F.2d 334, 337 (5th Cir. 1976); *Empresa Constuctora Contex Limitada v. Iseki, Inc.,* 106 F. Supp. 2d 1020, 1026 (S.D. Cal. 2000); *see also In re Arbitration between Trans Chemical Ltd. and China Nat'l Mach. Import and Export Corp.,* 978 F. Supp. 266, 310 (S.D. Tex. 1997) (holding that "[t]he right to due process does not include the complete set of procedural rights guaranteed by the Federal Rules of Civil Procedure. By agreeing to arbitration [the respondent] subjected itself to its advantages and disadvantages.").

Pertamina argues that the existence of political risk insurance refutes KBC's contention at arbitration that FPL was willing to finance the project to protect its $40 million investment, and casts serious doubt on KBC's contention, adopted by the Tribunal, that the parties' contract provided that Pertamina and PLN bore the entire risk of government action suspending the Project. Pertamina further argues that the amount of the insurance policy calls into question the amount of KBC's damages. Thus, Pertamina contends that the denial of discovery prevented it from discovering the insurance policy and in turn prevented it from presenting its case to the Tribunal.

These arguments lack merit. Pertamina's inability to offer evidence of the political risk insurance policy at the arbitration did not prevent it from receiving a fundamentally fair hearing. The context in which the financing issue arose is significant to the analysis of Pertamina's contentions. At the inception of the Project and continuing for several years, KBC intended to finance the Project through third-parties, such as banks. *See* Pertamina's Memorandum, at 5-6 and Exhibits 3-13. However, Pertamina argued in its opening arbitration brief that "no third party was willing to provide financing for projects in Indonesia in 1998 due to Indonesia's unstable political and economic situation." *Id.* at 6. As Pertamina itself frames the issue: "KBC's claim for $667.1 million in damages required that KBC could have performed the contract profitably *absent the alleged breach.* At the threshold, therefore, KBC had to prove that it could have obtained the $500 million necessary to construct the generating facilities on which its damage claim depended." *Id.* at 4 (emphasis added). Thus, the issue is whether KBC could have gone forward with the project if Pertamina and PLN met their obligations.

McGrath acknowledged the problem facing KBC in 1998 in obtaining third-party financing. *Id.* at 6; Ex. 17 to Pertamina's Rule 60(b) Motion, Declaration of Robert McGrath ("McGrath Declaration"), ¶ 21. However, McGrath and another KBC witness, Leslie Gelber, President and Chief Operating Officer of Caithness Energy L.L.C. and former Vice President of FPL, testified that FPL was willing in 1998 to

provide the necessary financing because (1) FPL entities had already invested $40 million in the Project; (2) the ESC and JOC are dollar denominated; (3) the Project had the possibility for development of greater than 210 MW of energy; and (4) the ESC obligated PLN to obtain for KBC a letter of support of the type generally acceptable to lenders. McGrath Declaration, ¶¶ 15, 21-35; Ex. 18 to Pertamina's Rule 60(b) Motion, Declaration of Leslie Gelber ("Gelber Declaration"), ¶¶ 10, 26-35; Arb. Tr. 58:7. Thus, while in a general sense the availability of insurance may be a relevant factor that a prudent investor might consider in making a decision about project financing, the existence $75 million in insurance coverage on a $500 million project does not contradict or "refute" KBC's evidence that financing was available. This is particularly true where, as here, the proposed project financing was to come from an investor that was not the insured under the political risk insurance policy.[8]

Pertamina's argument that the insurance policy refutes KBC's evidence regarding FPL financing is in actuality an attempt to challenge the credibility of KBC's witnesses.[9] Had the insurance policy been in evidence, the Tribunal presumably would have weighed it along with the testimony of McGrath and Gelber. The Tribunal found KBC's witnesses credible and ruled, "[r]egarding the financing necessary for the Project development, there is no reason in the

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[8] There is no evidence before the Court that the Caithness entities and FPL are not separate legal entities.

[9] *See* Coquillette Report, ¶¶ 25-26.

Arbitral Tribunal's opinion to cast doubts about [KBC's] readiness, directly and/or through its shareholders, to make provision thereof." Ex. 24 to Pertamina's Rule 60(b) Motion, Arbitral Award, ¶132. Credibility determinations, and weight of the evidence considerations, are beyond the purview of this court in reviewing the Arbitral Award, particularly upon a Rule 60(b) motion. *See Government Fin. Servs,* 62 F.3d at 771 n.10.

Pertamina's second argument, that the existence of the political risk insurance policy belies KBC's position that the contracts allocated such risk to Pertamina and PLN, also is unavailing. The allocation of risk is a contractual matter. The Court will not look to a third party contract like the insurance policy to determine the intent of the parties to the ESC and JOC. The Court agrees with the basic premise asserted by Pertamina's expert, Daniel R. Coquillette, that an individual or entity must have an insurable interest to secure an insurance policy.[10] However, KBC's investors clearly had an insurable interest in their investments. Some or all of the investors were entitled to attempt to partially protect their investments in the event the Project was terminated and PLN or Pertamina failed to live up to the contractual obligation to assume certain risks. It is not unusual for a party to have multiple layers of protection for a single interest; indeed, this practice is anticipated in the insurance policy's subrogation provision requiring repayment in

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[10] *See* Coquillette Report, ¶¶ 23-25.

the event an insured recovers from another source for an injury.

Similarly, the insurance policy, which had a coverage limit of $80 million, is not probative of the amount of KBC's damages. The insurance policy covered only some investors, not including FPL, in the event the Project did not go forward due to governmental action. There is no evidence that the policy was expected to cover the entire value of the Project, including potential lost profits. The Arbitral Award compensated KBC approximately $111 million for its expenses and $150 million for lost profits. Arbitral Award, ¶¶ 108, 136. The $75 million paid under the insurance policy is not so inconsistent with the Arbitral Award of approximately $111 million for expenses as to constitute evidence refuting KBC's proof of its damages. Moreover, insurance coverage costs money. A higher amount of protection requires a higher premium. Complex business decisions typically are involved in determining the appropriate amount of coverage. The extent of potential exposure to loss is only one element of that decision. The amount of insurance carried by a KBC investor simply is not probative of the actual damages incurred by KBC due to Pertamina's and PLN's breach of the parties' agreements.

The insurance policy, at best, is evidence that certain investors in the Project were protected to a limited extent in the event that the Project was terminated for political reasons. KBC, however, in order to succeed on its claims, was not required to prove at the arbitration that neither it nor any of its

investors had political risk insurance. Pertamina has proffered no legally viable defense that would have been established by, or meaningfully supported by, proof that such insurance existed. The existence of the political risk insurance policy at issue suggests only that certain KBC investors had some doubts about the ability to collect damages *if* Pertamina or PLN failed to perform under the contracts as agreed. This is an entirely different matter from the issues of whether a different KBC investor would lend significant sums to fund the Project or whether the contracting parties had agreed that Pertamina would bear the risk of the Indonesian Government's intervention to stop the project. Thus, Pertamina's inability to rely on the insurance policy during the arbitration did not prevent Pertamina from presenting a meaningful case against KBC, and there was no denial of due process.

The circumstances here are materially distinquishable from those in *Iran Aircraft Indus. v. Avco, 980* F.2d 141 (2d Cir. *1992),* in which the Second Circuit refused to enforce an arbitral award pursuant to Article V(1)(b) of the New York Convention. In that case, the arbitration tribunal told the claimant, Avco, that it could present its evidence in summary form to support its damages claim. Yet, the Tribunal later denied Avco relief because Avco failed to present the underlying invoices to support its damage request. *Id.* at 146. The district court concluded, and the Second Circuit agreed, that the tribunal had prevented Avco from meaningfully presenting its damages case because the tribunal had changed the evidentiary requirements without notice to Avco.

Pertamina, in contrast, was not denied the opportunity to present a meaningful case to the Arbitral Tribunal. Pertamina was allowed to present and cross-examine witnesses. Pertamina submitted extensive briefing to the Tribunal. Pertamina knew McGrath and Gelber were testifying for KBC on the issue of financing, and it had an opportunity to conduct cross-examination to ask about the existence of political risk insurance if it was relevant. Nevertheless, Pertamina contends that procedural rules governing the arbitration prevented Pertamina from further questioning McGrath after the Tribunal posed its question regarding OPIC insurance during KBC's redirect of McGrath. However, Pertamina never asked for permission to do so. Further, Pertamina never pursued its earlier requests for discovery and did not ever specifically request insurance information, even after the subject was raised with McGrath by a Tribunal member. The Tribunal expressly gave the parties at the arbitration an opportunity to present or renew procedural objections. Pertamina stated that it had none. Pertamina did not argue to the Tribunal that McGrath's testimony illustrated the relevance and necessity of the discovery it had sought from KBC. The Tribunal itself, had it been interested or found it relevant, could have followed up on McGrath's testimony and asked him or KBC for information about political risk insurance. None of these things occurred. Instead, Pertamina withdrew its discovery requests, and informed the Tribunal that it was satisfied that it had been given a fair hearing. Under the circumstances, Pertamina was not denied due process. *See In re Arbitration between Trans*

Chemical Ltd. and China Nat'l Mach. Import and Export Corp., 978 F. Supp. 266, 307 (S.D. Tex. 1997) (confirming arbitration award where respondent did not pursue discovery with tribunal and stated at the conclusion of the arbitration hearing that the arbitration had been conducted with "propriety and fairness").

In hindsight, Pertamina apparently wishes it had done things differently. As with its belated decision to pursue annulment proceedings in the Indonesian courts after initially futilely seeking review in the Swiss Supreme Court, Pertamina now attempts to undo the effect of an unsuccessful strategic decision made years ago during the arbitration itself.[11]

Pertamina supplies no probative reasons to undermine the validity of a properly convened and conducted arbitration, or the integrity of the international arbitration system. Submission of disputes to arbitration always risks an accumulation of procedural and evidentiary shortcuts that would properly frustrate counsel in a formal trial. But because `the advantages of arbitration are speed and informality, an arbitrator should be expected to act affirmatively to simplify and expedite the proceedings before him. Thus, whatever indignation a reviewing court may experience in examining the record, it must resist the temptation to condemn

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[11] Pertamina's argument could be said to be a further attempt to avoid the impact of its arbitration agreement, as suggested by Pertamina's repeated and unexplained lengthy delays *inter alia* in appointing arbitrators and filing arbitration briefs.

imperfect proceedings without a sound statutory basis for doing so. *Forsythe Int'l, S.A. v. Gibbs Oil Co. of Texas, 915* F.2d 1017, 1022 (5th Cir. 1990) (confirming award under Federal Arbitration Act). The fact that post-arbitration discovery revealed a marginally relevant document that Pertamina now believes it could have used (largely for impeachment purposes) at the arbitration does not establish a denial of due process attributable to the Tribunal's, or this Court's, refusal to grant requested discovery.

In judging discovery requests in this context, the court must weigh the asserted need for hitherto undisclosed information and assess the impact of granting such discovery on the arbitral process. The inquiry is an entirely practical one, and is necessarily keyed to the specific issues raised by the party challenging the award and the degree to which those issues implicated factual questions that cannot be reliably resolved without some further disclosure. *Frere v. Orthofix, Inc.*, 2000 WL 1789641, * 5 (S.D.N.Y. Dec. 6, 2000); *see Lummus Global Amazon, S.A. v. Aguaytia Energy Del Peru, S.R. LTDA*, 2002 WL 31401996, *26-27 (S.D. Tex. March 27, 2002) (court denied discovery because the record was adequate to permit the court to decide the issues presented).[12]

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[12] The *Lummus* court remanded the case to the International Chamber of Commerce on two narrow, specific, and limited issues. 2002 WL 31401996 at *36, *41. Neither party here has requested remand to the Arbitral Tribunal, and the circumstances necessitating remand in *Lummus, i.e.*, the failure of the arbitration panel's ruling to resolve all issues raised by the parties with certainty, is not present in this case.

The issue before this Court on summary judgment was whether Pertamina had a fundamentally fair hearing during the arbitration. The Court held, after close consideration of the extensive submissions and arguments by the parties, that the arbitration procedure and result did not violate Pertamina's due process rights. The record on summary judgment amply supports the Court's ruling, which was based *in part* on Pertamina's tactical decision to withdraw its discovery requests at the end of the arbitration hearing. The allegedly new evidence on which Pertamina relies to seek reconsideration does not alter the Court's conclusions. Pertamina's Rule 60(b) Motion based on Article V(1)(b) of the New York Convention is denied.

C. Article V(2)(b) - Public Policy

The Convention allows confirmation of an award to be refused if "the recognition or enforcement of the award would be contrary to the public policy of that country." 9 U.S.C. § 201, Art. V(2)(b). The public policy defense applies only in the narrowest of circumstances. Courts repeatedly have held that the public policy defense requires a violation of the "most basic notions of morality and justice." *Slaney v. Int'l Amateur Athletic Fed'n,* 244 F.3d 580, 593 (7th Cir. 2001) (quoting *Fotochrome, Inc. v. Copal Co.,* 517 F.2d 512, 516 (2d Cir. 1975); *see also Europcar Italia, S.p.A. v. Maiellano Tours, Inc.,* 156 F.3d 310,315 (2d Cir. 1998); *Industrial Risk Ins. v. M.A.N. Gutehoffnungshutte GmbH, 141* F.3d 1434, 1445 (11th Cir. 1998); *Parsons & Whittemore Overseas, Co., Inc. v. Societe Generale de L'Industrie du Papier (RAKTA),* 508 F.2d 969, 974 (2d Cir. 1974). The

award must violate an "explicit public policy that is well-defined and dominant ... [and is] ascertained by reference to the laws and legal precedents and not from general consideration of supposed public interests." *Industrial Risk Ins.*, 141 F.3d at 1445 (quoting *Drummond Coal Co., v. United Mine Workers, Dist. 20,* 748 F.2d 1495, 1499 (11th Cir. 1984) (internal quotes deleted)). The Court is not persuaded that KBC's failure to bring its investors' insurance policy to the Tribunal's attention renders the Arbitral Award void under the New York Convention.

The right to discovery in an arbitration is far more limited than in a traditional civil litigation under the Federal Rules of Civil Procedure. *Frere v. Orthofix, Inc.*, 2000 WL 1789641, *4-5 (S.D.N.Y. 2000); *see Forsythe Int'l,* 915 F.2d at 1022 (noting in review of an arbitration under the Federal Arbitration Act that "such proceedings require `expeditious and summary hearing, with only restricted inquiry into factual issues,'" quoting *Legion Ins. Co. v. Insurance General Agency,* 822 F.2d 541, 543 (5th Cir. 1987)). Thus, KBC's duty to voluntarily produce information or documents in the arbitration process is not to be judged by the extensive disclosure requirements for civil discovery under the Federal Rules. Furthermore, KBC did not "secretly" withhold a relevant document, as Pertamina contends. KBC consistently objected to Pertamina's discovery requests. Assuming for the sake of this analysis that the insurance policy was responsive to one of Pertamina's document requests, the Tribunal was aware of the parties' discovery dispute. The Tribunal never ordered KBC to produce

responsive documents; instead, the Tribunal took the matter under advisement until after the hearing. Whether the Tribunal would have allowed further discovery before issuing its Final Award if Pertamina had not withdrawn its request cannot be known by this Court, nor Pertamina's expert.[13] Pertamina must live with its strategy decision. It is not contrary to United States public policy for KBC to decline to voluntarily turn over documents that it had no statutory, ethical, or other obligation to produce. The refusal to produce the insurance policy is not a justifiable basis for the Court to deny confirmation of the Arbitral Award.

More significantly, Pertamina has not supported the primary contention in its Motion that KBC misled the Tribunal. There is no doubt that parties and their counsel owe a duty of candor to an arbitral tribunal.[14] However, Pertamina's argument that KBC deceived the Tribunal is premised on a mischaracterization of McGrath's testimony. McGrath was asked a direct question about the existence of OPIC insurance for the project. He answered that he recalled discussions regarding such insurance, but did not know one way or the other if any existed. There is no indication that McGrath was

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[13] *See* Coquillette Report, ¶ 36 (opining that "had the Tribunal been aware of the policy it would likely have permitted Pertamina discovery on the issue."). This opinion is nothing more than speculation and is inadmissible. *See* FED. R. Ev. *702; Curtis v. M&S Petroleum, Inc.*, 174 F.3d 661 668 (5th Cir. 1999) (expert testimony must be more than unsupported speculation or subjective belief).

[14] *See* Coquillette Report, ¶¶ 38-42; Ex. S to Pertamina's Reply, Expert Report of Judge Stephen M. Schwebel, ¶¶ 4-9.

not truthful or was otherwise deceptive. In fact, it is just as likely that McGrath's answer led the Tribunal to believe that political risk insurance did exist as that it did not. Pertamina, had it thought necessary at the time, could have asked the Tribunal for permission to pose additional questions or requested that the Tribunal follow up. Pertamina did not do so. This was a sophisticated Tribunal, and so was Pertamina's counsel. If the interest of any of these people had been piqued by McGrath's answer, or if any had felt the existence of insurance was significant to the determination of whether KBC could have financed the project, a Tribunal member or Pertamina should have followed up at the arbitration. The failure of anyone to do so is a testament to the lack of genuine relevance of the issue.[15] There is no material issue of any deception. Rather, it appears that Pertamina may have re-evaluated its trial strategy.

Pertamina also argues that KBC breached its obligations under § 14 of the Energy Services Contract ("ESC," Ex. 2 to Pertamina's Rule 60(b) Motion). This argument lacks merit. Pertamina's contentions that the ESC required KBC to disclose the political risk insurance, and to obtain a waiver of subrogation, are contrary to the terms of that contract. The ESC requires KBC to obtain insurance policies that "shall provide at least the types of

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[15] Coquillette's putative expert testimony about what additional information the Tribunal would have been interested in based on this testimony is rank speculation, *see* Coquillette Report, ¶¶ 30-36, and is inadmissible.

insurance coverage and terms described in this Section 14." Section 14.2 lists the following types of insurance coverage KBC was obligated to obtain: (a) Construction/Erection All Risks (Clear) Insurance, which was to cover physical loss or damage to the permanent and temporary works of the facility under construction; (b) Marine Cargo Insurance, which was to cover physical loss or damage to materials, equipment, and supplies during transportation to the Project; (c) All Risks Property/Machinery Insurance, which was to cover physical loss or damage to the "Generating Facilities" as defined in the contract; (d) Comprehensive General Liability Insurance, which was to cover legal liability for damage to property or bodily injury to third parties arising out of the construction, ownership, operation, and maintenance of the Generating Facilities; and (e) Worker's Compensation Insurance. The ESC required PLN and its employees to be additional insureds under the policies. ESC § 14.3. The ESC further required PLN and KBC each to cause its insurers to waive all rights of subrogation *against the other party* in respect to any claim arising under its insurance policies. *Id.*

The ESC does not address political risk insurance. Moreover, the ESC only specifies insurance to be secured by KBC, not its investors. Pertamina, citing no authority, argues that KBC cannot avoid its obligations under the ESC by having its investors secure insurance. This contention is unpersuasive. KBC's investors are not parties to the ESC. There is no evidence that the investors are alter egos of KBC. Moreover, the fact that the ESC required PLN, an Indonesian government entity, to be named as an

"additional insured" under KBC's policies suggests that the ESC parties did not intend to include political risk insurance as part of that contract's requirements. The ESC provides no support for Pertamina's Rule 60(b) Motion.

D. Offset to Final Judgment

Finally, Pertamina contends that it is entitled to an offset of $75 million to the Final Judgment against it. Pertamina's argument is based on the fact that the ESC required KBC to secure a waiver of subrogation from its insurers. However, as discussed above, the ESC does not govern political risk insurance at all, let alone insurance purchased by a KBC investor. Pertamina's contentions must be rejected also because the insurance policy at issue contains a subrogation clause requiring the insured to repay the carrier for any benefits received if the insured recovers on a covered claim.[16] To the extent the insured (presumably one of the Caithness entities in this case) obtains any recovery based on the Final Judgment against Pertamina, the insured is obligated to repay the insurer. Thus, there will be no double recovery, and Pertamina is not entitled to any credit. The Court accordingly denies Pertamina's Rule 60(b) Motion requesting a $75 million offset to the Final Judgment.

IV. CONCLUSION AND ORDER

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[16] *See Ex. 58* to Pertamina's Reply, Policy No. 97BPL2126, at 9(5).

The Court has carefully considered each of Pertamina's arguments. Neither the existence of the political risk insurance policy under which Caithness, a KBC investor, was paid $75 million, nor the fact that the insurance policy was not disclosed to the Arbitral Tribunal, provides a ground to alter the Final Judgment granting summary judgment in favor of KBC to confirm the Arbitral Award pursuant to the New York Convention. It is therefore **ORDERED** that Pertamina's Rule 60(b) Motion [Doc. # 208] is **DENIED.**

SIGNED at Houston, Texas, this 30th day of May, 2003.

/s/

Nancy F. Atlas
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

In the Matter of an Arbitration Between
KARAHA BODAS COMPANY, L.L.C.,
Petitioner,

v.

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA,
Respondent.

No. CIV.A.H 01-0634

April 17, 2003

E. Thomas Bayko, Jones Day, Houston, TX, Kenneth S. Marks, Susman Godfrey LLP, Houston, TX, Christopher F. Dugan, Paul Hastings, Washington, DC, for Karaha Bodas Co., LLC.

Michael Lamar Brem, Baker Botts LLP, Houston, TX, Matthew D. Slater, Cleary Gottlieb, Washington, DC, F. Walter Conrad, Jr., Baker Botts, Houston, TX, Jonathan D. Schiller, William A. Isaacson, Boies & Schiller, Washington, DC, for Perusahaan Pertambangan Minyak Dan Gas Bumi Negara.

Eric Scott Lipper, Jirsch & Westheimer, Houston, TX, for Bank of America.

Patrick Carlton Appel, Adams & Reese LLP, Houston, TX, Douglas G. Boven, Crosby Heafey, San Francisco, CA, for American Overseas Petroleum, Ltd., PT Caltex Pacific Indonesia.

Jesse Ricker Pierce, Clements O'Neill, Houston, TX, Eric Grannon, Carolyn B. Lamm, Frank Panopoulos, White & Case, LLP, Washington, DC, for Ministry of Finance of Republic of Indonesia.

Roxanne Armstrong, Apache Corp., Houston, TX, for Apache Corp.

Carleton A. Davis, Hilgers & Watkins, Austin, TX, for OpicOil Houston, Inc.

ATLAS, District Judge.

This matter is before the Court on Perusahaan Pertambangan Minyak Dan Gas Bumi Negara's ("Pertamina's") Motion to Set Aside Judgment Under Fed.R.Civ.P. 60(b) ("Rule 60(b) Motion") [Doc. # 208].[1] Pertamina asks the Court to vacate its

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[1] *See* Pertamina's Memorandum in Support of its Motion to Set Aside Judgment Under Fed.R.Civ.P. 60(b) [Doc. # 209], and documentary exhibits and authorities [Doc. # 211] and expert reports [Doc. # 212] in support thereof; KBC's Memorandum in Opposition to Pertamina's Motion to Set Aside Judgment [Doc. # 220]; Pertamina's Reply Memorandum in Support of its Motion to Set Aside Judgment Under Fed.R.Civ.P. 60(b) [Doc. # 231], and expert reports [Doc. # 232] in support thereof; KBC's Sur-Reply to Pertamina's Motion to Set Aside Judgment Under Fed.R.Civ.P. 60(b) [Doc. # 239]; and Pertamina's Rebuttal

December 4, 2001 Judgment ("Final Judgment") granting summary judgment to Karaha Bodas Company, L.L.C. ("KBC") and confirming the award of an international arbitration tribunal of more than $260 million to KBC ("Arbitral Award"). Pertamina filed its current motion pursuant to Federal Rule of Civil Procedure 60(b) almost a year after filing its Notice of Appeal from the Final Judgment. The Fifth Circuit has remanded the case to this Court for the limited purpose of determining the merits of the Rule 60(b) Motion. Having considered the parties' voluminous submissions, all matters of record, and applicable legal authorities, the Court **denies in part** Pertamina's Rule 60(b) Motion and retains the remaining issues presented by the Motion **under advisement.**

I. BRIEF FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of contracts between Pertamina and KBC for the construction and operation of an electrical power plant in Indonesia (the "Project"). The parties executed two contracts, the Joint Operation Contract ("JOC") and Energy Sales Contract ("ESC"), both of which contained an arbitration clause calling for arbitration of disputes under the Arbitral Rules of the United Nations Commission on International Trade ("UNCITRAL"). After the Project was suspended by the government of Indonesia, KBC initiated arbitration proceedings, which resulted in a December 2000 Arbitral Award

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Memorandum in Support of its Motion to Set Aside Judgment Under Fed.R.Civ.P. 60(b) [Doc. # 240].

in favor of KBC.

Pertamina filed an action in the Swiss Supreme Court seeking to annul the Arbitral Award. Shortly thereafter, KBC filed the instant action to confirm the Arbitral Award. The Swiss court dismissed Pertamina's appeal for untimely payment of fees. This Court issued the Final Judgment in favor of KBC a few months later. Pertamina filed, on January 2, 2002, a timely Notice of Appeal from that Final Judgment. While its appeal was pending, Pertamina filed a new suit in Jakarta, Indonesia seeking to annul the Arbitral Award. KBC sought and obtained a Preliminary Injunction from this Court ordering Pertamina to refrain from prosecuting the Indonesian action. Despite the Preliminary Injunction, Pertamina's actions resulted in an August 7, 2002 ruling from the Indonesian court setting aside the Arbitral Award and enjoining KBC from enforcing the Award. In December 2002, Pertamina filed this Rule 60(b) Motion asserting, among other things, that this Court should grant it relief from the Final Judgment because the Arbitral Award on which it is based has been annulled by an Indonesian court. The Fifth Circuit issued a limited remand to this Court for a ruling on Pertamina's 60(b) Motion. Pursuant to the parties' agreed briefing schedule, this matter was fully briefed and ripe for adjudication as of March 26, 2002.

II. ANALYSIS

Pertamina's 60(b) Motion has three parts: (1) a request for relief from this Court's December 4, 2001 Final Judgment under Rule 60(b)(2) based on newly

discovered evidence, namely the existence of political risk insurance coverage for the investment in the Project pursuant to which KBC's investors were paid $75 million; (2) a request for relief from the December 4, 2001 Final Judgment under Rule 60(b)(5) because the Central Jakarta District Court annulled the underlying Arbitral Award on August 27, 2002; and, alternatively, (3) a request that the December 4, 2001 Final Judgment be deemed satisfied to the extent of the $75 million dollar insurance payment. This Memorandum and Order addresses only the second part of Pertamina's Rule 60(b) Motion relating to the effect of the Indonesian annulment.

Rule 60(b)(5) of the Federal Rules of Civil Procedure authorizes the Court to grant relief from its Judgment if the "judgment upon which it is based has been reversed or otherwise vacated." The Central Jakarta District Court annulled the Arbitral Award on August 27, 2002. Pertamina argues that the Jakarta annulment is valid under the Convention on the Recognition and Enforcement of Foreign Tribunal Awards ("New York Convention") because Indonesia is the court with primary jurisdiction over the Arbitral Award. Thus, Pertamina argues, this Court must vacate its Final Judgment enforcing the Arbitral Award pursuant Article V(1)(e) of the New York Convention.

The New York Convention contemplates two types of court proceedings following an arbitral award: (i) proceedings to annul or set aside the arbitral award; and (ii) proceedings seeking recognition and enforcement of the arbitral award.

See Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc., 126 F.3d 15, 23 (2d Cir.1997). Pursuant to Article V(1)(e) of the Convention, a court "may" refuse recognition and enforcement of an arbitration award if it has been set aside by a court of competent authority in "the country in which, or under the law of which" the award was made. The country in which, or under the law of which, the award was made is the court of "primary jurisdiction." Proceedings for recognition and enforcement of an arbitration award may be brought in the courts of any signatory country to the Convention. Such courts are said to have "secondary jurisdiction." Pertamina has submitted the Expert Report of Albert Jan van den Berg (March 29, 2002) (Ex. 7 to Pertamina's Opposition to KBC's Application for Turnover Order and Cross Motion for Stay of Enforcement and Ex. O to Pertamina's Rule 60(b) Motion), the Opinion of Professor W. Michael Reisman (May 6, 2002) (Ex. 1 to Brief in Support of Pertamina's Motion for Partial Stay and Ex. L to Pertamina's Rule 60(b) Motion), and W. MICHAEL REISMAN, SYSTEMS OF CONTROL ININTERNATIONAL ADJUDICATION AND ARBITRATION 114 (1992) (Ex. 36 to Pertamina's Rule 60(b) Motion) is support of the New York Convention's jurisdictional scheme.

This Court is a court of secondary jurisdiction. That status constrained the Court on summary judgment to consider only the seven defenses to enforcement of the Arbitral Award specifically set forth in Article VI of the Convention, whereas a court of primary jurisdiction is not so limited. *See Yusuf*, 126 F.3d at 21 (a motion to set aside an international arbitral award is controlled by the domestic law of

the rendering state).

The general enforcement scheme of the New York Convention is not a matter of dispute. The issue presented by Pertamina's Rule 60(b) motion is whether, under that scheme, Indonesia has primary jurisdiction over the Arbitral Award. In its April 26, 2002 Preliminary Injunction, this Court concluded that the arbitration was conducted under the arbitral law of Switzerland, and thus Swiss courts have primary jurisdiction over the award. The Court stands by that decision, as explained hereafter. Because the Swiss Supreme Court rejected Pertamina's appeal, albeit on procedural grounds, Pertamina does not have a cognizable defense to the enforcement of the Arbitral Award under Article V(1)(e) of the New York Convention.

Pertamina now insists, contrary to its earlier actions and assertions, that the parties' contracts-the JOC and ESC-designate Indonesian arbitral law to govern the arbitration. Pertamina relies on the following contractual provisions for its position:

> The parties expressly agree to waive the applicability of (a) Article 650.2 of the Indonesian Code of Civil Procedure so that the appointment of the arbitrators shall not terminate as of the sixth (6th) Month after the date(s) of their appointments and (b) the second sentence of Article 620.1 of the Indonesian Code of Civil Procedure so that the arbitration need not be completed within the specific time.

JOC, Ex. 1, Article 13.2(a); ESC, Ex. 2, § 8.2(a).

> In accordance with Section 631 of the Indonesian Code of Civil Procedure, the Parties agree that the Tribunal need not be bound by strict rules of law where they consider the application thereof to particular matters to be inconsistent with the spirit of this Contract and the underlying intent of the Parties, and as to such matters their conclusion shall reflect their judgment of the correct interpretation of all relevant terms hereof and the correct and just enforcement of this Contract in accordance with such terms.

JOC, Ex. 1, Article 13.2(b); ESC, Ex. 2, § 8.2(b).

> The parties hereby renounce their right to appeal from the decision of the arbitral panel and agree that in accordance with Section 641 of the Indonesian Code of Civil Procedure neither Party shall appeal to any court ... and accordingly the Parties hereby waive the applicability of Articles 15 and 108 of the Law No. 1 of 1950 and any other provision of Indonesian law and regulations that would otherwise give the right to appeal the decisions of the arbitral panel.

JOC, Ex. 1, Article 13.2(d); ESC, Ex. 2, § 8.2(d).

Pertamina's Indonesian law expert testifies that these provisions reference then applicable Indonesian law. "Declaration of Prof. Mr. Dr.

Sudargo Gautama"[2] (March 25, 2002) (Ex. 5 to Pertamina's Turnover Opposition and Ex. F to Pertamina's Rule 60(b) Motion). This assertion is not disputed. Moreover, it is uncontested that Indonesian law is the substantive law governing the contracts.[3] Pertamina diverges from this Court's prior ruling by arguing that the above-quoted clauses indicate the intent of the parties to adopt Indonesian law as the procedural law governing the arbitration as well. Pertamina asserts that this Court has "eschewed" an analysis of the contracts and urges the Court to adopt Pertamina's positions. Contrary to Pertamina's contentions, the Court previously has scrutinized-and again now parses-the JOC and ESC terms. The Court finds Pertamina's position on the meaning of these contracts entirely unpersuasive.

It is the general rule that the procedural law of the place of arbitration governs an arbitration. As Pertamina's expert Albert Jan van den Berg has written, "the arbitration law of the country where the arbitration takes place governs the arbitration. The

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[2] Gautama and his firm are counsel to Pertamina in the Indonesian action against KBC.

[3] To the extent Pertamina submits Gautama's Declaration as expert opinion that Indonesian law does not permit waiver of the right to seek an annulment of an arbitration proceeding, the opinion is unsupported by authority and fails the requirements for admissibility of expert opinion established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). *See Tanner v. Westbrook*, 174 F.3d 542, 548 (5th Cir.1999). Among other things, the testimony must be reliable and relevant. *Pipitone v. Biomatrix*, 288 F.3d 239, 243-45 (5th Cir.2002); *Rodriguez v. Riddell Sports, Inc.*, 242 F.3d 567, 580-81 (5th Cir.2001); *Tanner*, 174 F.3d at 546. Gautama provides no legal or other basis for his bold assertion.

place of arbitration in this sense is determined by the parties in their arbitration agreement." Albert Jan van den Berg, *When is an Arbitral Award Nondomestic Under the New York Convention of 1958,* 6 PACE L. REV. 25, 44-45 (1985). Thus, by choosing to arbitrate in Geneva, Switzerland, and not including an express provision stating that Indonesian law governs the arbitration, the parties expressed their intent that the arbitration would be governed by Swiss law. *See also Karaha Bodas Co. v. Pertamina,* No. 28 OF 2002, In the High Court of the Hong Kong Special Administrative Region Court of First Instance (J. Burrell, Mar. 27, 2003) [Doc. # 242], at 14 ("I find it irresistible that the choice of Geneva as the 'place' was also a choice that it was the formal 'seat' in the legal sense. By the same token it is plain that the choice of an independent neutral seat of arbitration carried with it an intention to be bound by the *lex arbitri* of that place.").

Pertamina also cites H.G. GHARAVI, THE INTERNATIONAL EFFECTIVENESS OF THE ANNULMENT OF AN ARBITRAL AWARD 20 (2002) (Ex. 40 to Pertamina's 60(b) Motion), for the proposition that a provision calling for arbitration in one country under the arbitration law of another country "often occurs in international transactions, particularly in State contracts to which one of the contracting parties is a State or related entity." However, other authorities submitted by Pertamina call such agreements "unusual," "exceptional," or a "dead letter." *See* Declaration of Prof. Mr. Dr. Sudargo Gautama, ¶ 14 (Ex. F to Pertamina's Rule 60(b) Motion); Expert Report of Albert Jan van den

Berg, ¶¶ 9, 20 (Ex. O to Pertamina's Rule 60(b) Motion); *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 21 n. 3 (2d Cir.1997). In any event, the issue is purely academic because the contracts at issue here contain no provision calling for arbitration under the arbitration law of another country different from the country where the arbitration was held.

The Court agrees with Pertamina's contention that the parties have contractual autonomy to chose the applicable arbitral law. *See* ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARD A UNIFORM INTERPRETATION 267 (1981) (Ex. 41 to Pertamina's 60(b) Motion). "The first rule is the primary rule of party autonomy according to which the parties have the liberty to subject the arbitration agreement to the law of their choice. The second rule is the subsidiary rule of territoriality according to which the arbitration agreement is, *failing a choice of law by the parties,* governed by the law of the country where the award was made." *Id.* at 291 (emphasis added). Pertamina deduces from this innocuous general statement the unwarranted conclusion that the parties here chose Switzerland as the place of arbitration, but designated Indonesian procedural and substantive law to apply.

Article 13.2(d) of the JOC and § 8.2(d) of the ESC relate to post-award procedures, namely, a waiver of right to appeal an award to any court, not the conduct of the arbitration. The other two provisions cited by Pertamina refer to Indonesian arbitration law: one clause expressly *excludes* application of a

provision of Indonesian law (JOC Article 13.2(a) and ESC § 8.2(a)), and one expressly *includes* application of a provision of Indonesian law (JOC, Article 13.2(b) and ESC, Ex. 2, § 8.2(b)). These provisions demonstrate that the parties intended to assume control over certain arbitration procedures as a matter of contract, whether or not those procedures would otherwise be applicable as a matter of law. The presence of those provisions in the contract is not evidence of the parties' choice of Indonesian arbitral law as a whole to govern the arbitration. Rather, these provisions demonstrate merely that the parties sought to avoid speculation or later argument about the effect of those provisions. Given the extensive detail of the parties' contracts, and the enormity of the Project-related finances, the parties-had they in fact desired-could have included a provision specifically incorporating Indonesian arbitral law despite the arbitration situs in Switzerland. Had they done so, they would have altered the standard territorial rule on applicable arbitral law. The parties did not do so. Pertamina's *post hoc* and forced construction of the contracts to serve its current purposes is not supported by the contractual language to which the parties are bound.

Pertamina insists, on the one hand, that the intent of the parties must be gleaned only "from the contractual language on which they agreed at the time of contracting." Pertamina's Reply, at 34. The Court agrees that this principle of contract law applies. Nevertheless, Pertamina provides the Affidavit of G.A.S. Nayoan, the Exploration and Production Director of Pertamina, who was the principal negotiator of the contracts for Pertamina

(Ex. 76 to Pertamina's Rule 60(b) Motion) as evidence of the parties' intent.[4] Under basic contract construction principles, endorsed by Pertamina as indicated, Nayoan's Affidavit constitutes parol evidence that is inadmissible to vary the unambiguous terms of the contracts. *See, e.g., Norfolk Shipbuilding & Drydock v. Seabulk*, 274 F.3d 249, 254 (5th Cir.2001); *Avatar Exploration, Inc. v. Chevron, U.S.A., Inc.*, 933 F.2d 314, 320 (5th Cir.1991). Moreover, Nayoan's self-serving Affidavit is insufficient to create a genuine issue of material fact as to the meaning of the contracts in light of Pertamina's many written, post-dispute submissions and conduct evidencing a contrary intent.

Pertamina argues that its statements and actions in litigation are immaterial and that no judicial estoppel arises from them. The Court already has found that the parties' contracts, as written, demonstrate that the parties contracted for the application of Swiss arbitral law. The post-contract factual record concerning Pertamina's conduct

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[4] Gautama's opinion that "the parties intended to invoke the non-excluded provisions of Indonesian law as the governing law of their arbitral proceedings" (Ex. F to Pertamina's Rule 60(b) Motion, ¶ 13), as well as van den Berg's opinion that "it was the parties' clear intention to choose Indonesian arbitration law" (Supplemental van den Berg Opinion, Ex. P to Pertamina's Rule 60(b) Motion), are inadmissible. They are not proper expert opinions; these opinions do not represent conclusions based on technical or specialized knowledge. They are, instead, parol evidence offered on factual matters. These opinions invade the Court's province to interpret the parties' contracts as a matter of law. Moreover, these witnesses have no personal knowledge of the contract negotiations, even if such matters were admissible.

corroborates the Court's findings made above regarding Pertamina's intent at the time of contracting with KBC. The Tribunal issued the Arbitral Award in favor of KBC in December 2000. On February 1, 2001, Pertamina filed a proceeding to nullify the Award in the Swiss Supreme Court. This act of seeking nullification from the Swiss courts, not the Indonesian court, demonstrates as a factual matter that Pertamina intended Swiss arbitral law to apply and believed that the parties had agreed to Swiss arbitral law under their contracts. Pertamina reinforced its view in this regard through its repeated efforts to resuscitate the Swiss proceeding after the April 24, 2001 dismissal by the Swiss Supreme Court for failure to timely pay filing costs.

Meanwhile, on February 22, 2001, KBC filed this action seeking confirmation of the Arbitral Award. Pertamina participated fully in this case. After the Swiss court issued its final ruling in August 2001,[5] this Court issued, on December 4, 2001, its decision granting KBC's motion for summary judgment confirming the Arbitral Award and the Final Judgment in favor of KBC. Pertamina appealed the Final Judgment, but did not file a supersedeas bond to stay execution on the judgment. Belatedly, on March 14, 2002, approximately *fifteen months* after entry of issuance of the Arbitral Award, *eight months* after the Swiss court's dismissal of its appeal, and *over three months* after entry of Final Judgment in this case, Pertamina filed an annulment action in Jakarta, Indonesia, challenging the Arbitral Award

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[5] On August 7, 2001, the Swiss Supreme Court declined to reconsider its decision and the dismissal became final.

and seeking an injunction and penalties against KBC's enforcement of that Award.

Pertamina attempts to explain its failure to initially and timely seek relief from the Indonesian court. Pertamina states that under Indonesian law the action could not be filed until after the Arbitral Award was registered in Indonesia, which required several procedural steps and did not take place until March 8, 2002. However, Pertamina never asserts when it began the steps to register the Award in Indonesia. Pertamina does not, in its many detailed and extensive submissions, provide any proof that it began this process promptly after the Award was issued in December 2000. Pertamina also fails to explain why it took such an extended period of time to register the Arbitral Award. Pertamina merely makes the unpersuasive, vague assertion that it commenced annulment proceedings in Indonesia "as early as was practicable" and that it "was able to cause the Award to be registered" as soon as it fulfilled the necessary procedural requirements.[6] This limited recitation stands in stark contrast to the fact that Pertamina promptly filed a proceeding challenging the Arbitral Award in Switzerland and argued strenuously for delays of proceedings before this Court pending the outcome of the Swiss proceeding. Pertamina never sought from this Court any delay pending an Indonesian action. This conduct is inconsistent with and belies Pertamina's current posture that KBC and Pertamina intended at the time of contracting that Indonesian courts have

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[6] Pertamina's Memorandum in Support of Rule 60(b) Motion, at 10.

primary jurisdiction to annul the Arbitral Award.

Moreover, Pertamina's original interpretation of its contracts with KBC was in evidence when Pertamina repeatedly represented to the Tribunal that Swiss arbitral law applied to the arbitration. In its January 10, 1999 "Memorial Regarding Preliminary Issues" submitted to the Tribunal, Pertamina stated "Reference to Swiss Law supports this conclusion. As a result, arbitration proceedings under both contracts are governed by Chapter 12 of the Swiss Private International Law Statute."[7] The Tribunal relied on Pertamina's urging of Swiss arbitral law in making the Award. *See, e.g.*, Preliminary Award in an Arbitration Procedure Under the UNCITRAL Arbitration Rules, September 30, 1999, § B(1) ("The Respondents support this conclusion by making reference to Swiss law as the JOC and the ESC provide for UNCITRAL Arbitration in Geneva between the parties which are neither Swiss nor Swiss resident. As a result, and under both contracts, the arbitration proceedings are governed by Chapter 12 of the Swiss Private International Law Statutes. Under Swiss law, [Respondent contends] the Arbitral Tribunal is lacking jurisdiction because KBC failed to comply with the contractual prerequisites to arbitration.");

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[7] Ex. 23 to KBC's Motion for Summary Judgment, at 27. *See also id.* at 28 ("Indeed, the Swiss Courts have required that parties strictly adhere to the precise terms of their arbitration agreement"); *id.* at 33 ("The arbitrators do not, under the arbitration agreements and the Swiss law in force at the seat of arbitration, have the power ..."); *id.* at 38 ("It would be subject to setting aside in Switzerland under Articles 179 and 190 of the Swiss PIL").

id. § C(1) ("The Respondents also state that, under the arbitration agreements and Swiss law, the arbitrators have no power to consolidate ..."); *id.* § C(3) (citing the "famous Westland Case" of the Swiss Federal Tribunal in support of its decision that a consolidated arbitration was appropriate); *id.* § D(1) (Respondents contend "such solution is not acceptable under the applicable Swiss law").

In asking this Court to stay this action pending its appeal to the Swiss Supreme Court, Pertamina reiterated its belief that the parties had agreed to Swiss arbitral law. Pertamina stated: "The arbitration award ... was conducted subject to the arbitration laws of Switzerland, and the Swiss court is empowered to vacate an award rendered in Switzerland ... KBC is asking this Court to act prematurely to confirm an award that might be overturned in the country whose law governed the arbitration."[8] These representations are strong

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[8] Respondent Pertamina's Motion for Stay Pending Resolution of Swiss Appeal and Memorandum in Support [Doc. # 13], at 1. *See also id.* at 6 ("it is fundamental that the courts of the originating nation are in the best position to pass on issues under their own law ... Here, Pertamina's appeal encompasses questions of Swiss law"); Respondent Pertamina's Memorandum in Opposition to KBC's Motion for Summary Judgment [Doc. # 29], at 34-35 ("By adopting an arbitral procedure that resulted in such a disparate outcome, the tribunal thus exceeded its authority and failed to accord the parties equal treatment in direct contravention of the procedural law governing this arbitration. *See* RLA 1, Swiss Private International Law Statute ('PIL'), Article 182(3) ('the arbitral tribunal shall ensure equal treatment of the parties and the right of the parties to be heard in an adversarial procedure'); UNCITRAL Arbitration Rules, LA-6, Article 15 (requiring that parties 'are to be treated with equality and that

circumstantial evidence that Pertamina intended, at least until March 2002, Swiss arbitral law to apply. These representations also are strong acknowledgments by Pertamina that in fact the governing arbitral law was that of Switzerland.[9]

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at any stage of the proceedings each party is given a full opportunity of presenting its case.'). Neither the UNCITRAL Arbitration Rules nor the Swiss Private International Law Statute provide for non-consensual consolidation of arbitration disputes."); Pertamina's Answer to Petition [Doc. # 8], at 9 ("the applicable laws and treaties governing international arbitration give courts of the arbitration situs, here Switzerland, authority to vacate such awards"); Joint Discovery/Case Management Plan [Doc. # 11], at 2 ("the arbitration KBC seeks to confirm was rendered in Geneva, Switzerland, and is subject to Swiss arbitration law (and Indonesian substantive law). Pertamina has filed with the Swiss Supreme Court an appeal of the arbitration award.").

[9] In addition, Pertamina's comments to the Court and the Tribunal support the imposition of judicial estoppel. Judicial estoppel is a matter of federal procedure governed by federal law. *Ergo Science, Inc. v. Martin*, 73 F.3d 595, 600 (5th Cir.1996). Application of judicial estoppel rests in the Court's discretion. *Ahrens v. Perot Sys. Corp.*, 205 F.3d 831, 833 (5th Cir.2000). Judicial estoppel is "a common law doctrine by which a party who has assumed one position in his pleadings may be estopped from assuming an inconsistent position." *In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir.1999) (quoting *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir.1988)); *Hall v. GE Plastic Pacific PTE, Ltd.*, 327 F.3d 391, 396 (5th Cir.2003); *Ahrens*, 205 F.3d at 833. Most courts have identified two limitations on the application of judicial estoppel: (1) the position of the party to be estopped must be clearly inconsistent with a prior position, and (2) the court must have accepted the prior position. *Coastal Plains*, 179 F.3d at 206;*Ahrens*, 205 F.3d at 833. Judicial acceptance means only that the court has adopted the position urged by a party, *either as a preliminary matter* or part of a final disposition. *Coastal Plains*, 179 F.3d at 206 (emphasis added). This Court explained in its Preliminary Injunction that it relied on Pertamina's assertion that the Swiss

Pertamina further disputes KBC's contention that Swiss law forbids the application of another country's arbitral law to an arbitration conducted in Switzerland. *See* Opinion of George Friedli, Esq. (June 27, 2002) (Ex. 4 to Pertamina's Partial Stay Reply and Ex. E. to Pertamina's 60(b) Motion); Supplemental Opinion of Professor W. Michael Reisman (June 27, 2002) (Ex. 5 to Pertamina's Partial Stay Reply and Ex. M. to Pertamina's 60(b) Motion). The Court need not make a definitive ruling on this aspect of Swiss law because the Court rejects Pertamina's assertion that the parties' contracts designate the application of Indonesian arbitral law.[10]

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court was the court with authority to annul the Arbitral Award in waiting until that court had ruled before considering KBC's summary judgment motion. Specifically, the Court set the briefing schedule in this case to allow time for the Swiss court to rule. The Tribunal also relied on Pertamina's prior position. *See supra* at 13-14. It is widely held that a position taken in an arbitration can give rise to judicial estoppel. *See Speroni S.P.A. v. Perceptron, Inc.*, No. 98-2192, 12 Fed.Appx. 355, 358 n. 1 (6th Cir. June 13, 2001), and cases cited therein; *cf. Universal American Barge Corp. v. J-Chem, Inc.*, 946 F.2d 1131, 1137 (5th Cir.1991) (an arbitration decision can have collateral estoppel or *res judicata* effect between the same parties in a subsequent proceeding). Thus, judicial estoppel does apply in this case to preclude Pertamina's current argument that Indonesia, not Swiss arbitral law applies. Pertamina's conduct reinforces this conclusion.

[10] Pertamina contends that a court in any state whose law is implicated by an award may make its own determination as to whether it has primary jurisdiction over an arbitral award. *See* ANDREAS BUCHER & PIERRE-YVES TSCHANZ, INTERNATIONAL ARBITRATION IN SWITZERLAND 29, 164 (1989) (Ex. 45 to Pertamina's 60(b) Motion). Pertamina's position appears contrary to the New York Convention's scheme

Pertamina next argues that the circumstances surrounding the negotiations of the parties' contracts evidences the parties' intent to incorporate Indonesian arbitral law. Specifically, Pertamina points to the agreements in the *Himpurna* and *Patuha* cases, in which the parties provided for arbitration in Indonesia. In those cases, the parties included the same provisions as in the JOC and ESC cited above regarding waiver or incorporation of Indonesian law. Pertamina contends that these similarities mean that the parties intended to adopt Indonesian arbitral law. Pertamina's argument falls of its own weight. What the *Himpurna* and *Patuha* cases show, if anything, is that the parties knew how to make the arbitration subject to Indonesian law if they wanted to do so. Significantly, the KBC-Pertamina JOC and ESC do not contain a key provision present in the *Himpurna* and *Patuha*

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for providing uniform rules for enforcement of international arbitration awards. Moreover, author Bucher notes that having "a double test [for determination of primary jurisdiction], *i.e.*, that of the place of arbitration and that of the law governing the arbitration, can give rise to discrepancies," for instance, "an award purporting to be made in Switzerland under German arbitration law is considered a Swiss award in Switzerland and a German award in Germany, with the result that such an award could be challenged in both countries." *Id.* The Court is unpersuaded by Pertamina's contention that Indonesia is in the "precise position" as Germany in the foregoing example; the evidence simply does not support Pertamina's assertion that the arbitration here was made under Indonesian arbitration law. In any event, whatever effect a country's own determination of its primary jurisdiction might have within its own territorial boundaries, it does not follow that a second court, such as this one, is bound by another court's patently invalid exercise of primary jurisdiction.

contracts, namely, a requirement of arbitration in Indonesia. It is the choice of Switzerland as the site of arbitration that renders Indonesian arbitral law inapplicable, not the inclusion of the above quoted provisions in the JOC and ESC. In particular, the parties' choice of Switzerland as the arbitration site combined with the absence of an agreement by the parties to apply the law of a jurisdiction other than Switzerland to the arbitration makes Swiss arbitral law applicable. The choice of Indonesia as the site for the *Himpurna* and *Patuha* arbitration negates Pertamina's attempted reliance on those cases.

Article V(1)(e) of the New York Convention provides that a court should deny enforcement of an arbitral award that has been annulled or set aside "by a competent authority of the country in which, or under the law of which" the award was made. This means that a court of secondary jurisdiction, such as this one, is discouraged from enforcing an award that has been set aside by a court of primary jurisdiction. This general proposition is not controversial. However, this premise does not answer the issue presented. First, at the time of this Court's Final Judgment, no court had annulled or set aside the Arbitral Award. This fact alone distinguishes this case from most of the cases cited by Pertamina.[11]

However, even if, as Pertamina contends, a post-judgment annulment is grounds to vacate the

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[11] *See Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194 (2d Cir.1999); *Spier v. Calzaturificio Tecnica, S.p.A.*, 71 F.Supp.2d 279 (S.D.N.Y.1999); *but cf. In re Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F.Supp. 907 (D.D.C.1996) (enforcing an arbitration award despite its annulment by an Egyptian court).

enforcement decision, the defense applies only where an arbitral award has been annulled by a court of "competent jurisdiction." Because the Central Jakarta District Court is not a court of competent jurisdiction in light of the parties' contract, the other facts presented, and the New York Convention, the Indonesian court's ruling purporting to annul the Arbitral Award has no legal effect on this Court's December 4, 2001 Final Judgment confirming that Award.[12]

Pertamina additionally argues that because the Preliminary Injunction is not a final order, the Indonesian ruling should be given precedence. This argument misses the mark. Pertamina conflates the issues raised by KBC's petition to enforce the Arbitral Award with the issues presented by the Preliminary Injunction, which relate to the propriety of Pertamina seeking a second forum for annulment of the Award. In using the term "Preliminary Injunction," the Court did not hold nor intend to suggest a lack of finality on the merits of the enforcement decision, as Pertamina argues. In fact, when KBC sought an order to restrain Pertamina's participation in the Indonesian action, and when the Court issued its Preliminary Injunction and the preceding Temporary Restraining Order, this Court's Final Judgment on the merits of KBC's claims already had been entered and was on appeal at Pertamina's instance. The Court, after due

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[12] The High Court of the Hong Kong Special Administrative Region, Court of First Instance, reached the same conclusion in its March 27, 2003 decision in the enforcement action brought by KBC in that court. *See* Doc. # 242.

consideration, rejected Pertamina's primary jurisdiction arguments in its Memorandum in support of the Preliminary Injunction issued April 26, 2002.[13] The only thing "preliminary" about these injunctions was that this Court was willing, as an accommodation to Pertamina, if requested, to consider further briefing on the propriety of the injunction. Until the Rule 60(b) Motion, Pertamina did not request such further consideration. The Court now has considered all of Pertamina's primary jurisdiction arguments *de novo* in connection with the Rule 60(b) Motion. The Court rejects Pertamina's contentions, declines to vacate its Final Judgment awarding summary judgment to KBC, and will not alter its injunction.[14] As set forth in detail above, the Court again holds that the Swiss courts have primary jurisdiction over the Arbitral Award and thus the Indonesian ruling purporting to annul the Arbitral Award is not issued by a court of competent jurisdiction. The Indonesian annulment ruling therefore is invalid and of no force and effect.

In reaching this conclusion, the Court also has considered carefully principles of finality and comity.

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[13] Although the Court recognized that Pertamina contemplated using an Indonesian annulment order as the basis for a Rule 60(b) motion, the Court anticipated that the Preliminary Injunction would forestall any Indonesian annulment order until the Court decided the propriety of Pertamina's seeking that relief at the time it did.

[14] The Court does not base its decision on the *res judicata* effect of its Preliminary Injunction or on a finding that Pertamina's current Rule 60(b) Motion is itself a violation of the Preliminary Injunction. Therefore, it is not necessary to discuss the expert report of Geoffrey C. Hazard, Jr., Ex. T to Pertamina's Rule 60(b) Motion.

These principles do not militate in favor of the Indonesian annulment obtained through Pertamina's circumvention of the New York Convention and by forum shopping until a court ruled in its favor. Indeed, it is Pertamina that has failed to recognize the finality of this Court's prior judgment, which was entered after Pertamina's full participation in this action and after the Swiss Supreme Court rejected Pertamina's appeal under the arbitral law applicable to the parties' arbitration. Respect for foreign judicial systems is an important consideration in cases under the New York Convention. *See Monegasque De Reassurances S.A.M. (Monde Re) v. Nak Naftogaz,* 311 F.3d 488, 498-99 (2d Cir.2002). The interests of finality and comity are best served by enforcing this Court's Final Judgment confirming the Arbitral Award.

Pertamina's further argument that KBC has waived any objection to the jurisdiction of the Indonesian court by defending itself before that court and filing an appeal of the annulment ruling is without merit. The cases of *Hanes Supply Co., Inc. v. Valley Evaporating Co.,* 261 F.2d 29, 35 n. 7 (5th Cir.1958), and *Sprague & Rhodes Commodity Corp. v. Instituto Mexicano Del Café,* 566 F.2d 861, 863 (2d Cir.1977), cited by Pertamina, deal with a party's waiver of an objection to personal jurisdiction by appearing in an action, and have no application here.[15] Moreover, Pertamina is not entitled to the

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[15] This is a unique case, substantively and procedurally. Pertamina's citation to the Restatement (Second) of Conflict of Law and Restatement (Third) of Foreign Relations regarding recognition of foreign judgments where the issue of personal jurisdiction has been fully litigated in the foreign jurisdiction

benefit of the equitable principle of waiver. The case in Indonesia was initiated by Pertamina after it had fully litigated its positions in the Courts of the United States. Pertamina exerted only superficial effort to comply with this Court's Temporary Restraining Order and Preliminary Injunction. The Court will not penalize KBC for defending itself against Pertamina's aggressive and questionable tactics.

This Court's Preliminary Injunction ruling and its ruling today are not intended to disparage the courts of Indonesia. The Court pointedly has directed its admonishments to the conduct of Pertamina, a party subject to its jurisdiction, not to criticize Indonesian courts.[16]

III. CONCLUSION AND ORDER

Because the Arbitral Award was made under the arbitral law of Switzerland, the Court rejects Pertamina's contention that the December 4, 2001 Final Judgment in this case must be vacated because

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also are inapposite. Indeed, § 482(2)(a) of the Restatement (Third) of Foreign Relations provides that "a court in the United States need not recognize a judgment of the court of a foreign state if: (a) the court that rendered the judgment did not have jurisdiction of the subject matter of that action." Likewise, Pertamina's reliance on cases recognizing the decision of another court's jurisdictional ruling based on full faith and credit is misplaced. The Indonesian court's, and this Court's, jurisdiction is governed by the specific provisions of the New York Convention.

[16] This Court does not and has not in any way credited or relied on KBC's assertions that the Indonesian courts are not an appropriate forum because they are biased or corrupt.

of the August 7, 2002 annulment of the Arbitral Award by the Central District Court of Jakarta, Indonesia. It is therefore

ORDERED that Pertamina's Rule 60(b) Motion is **denied in part** to the extent it seeks relief under Rule 60(b)(5) based on the August 7, 2002 ruling of the Indonesian court. It is further

ORDERED that all other aspects of Pertamina's Rule 60(b) Motion are **retained under advisement** and will be the subject of a future Memorandum and Order from this Court.

APPENDIX H

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

In the Matter of an Arbitration Between KARAHA BODAS COMPANY, L.L.C.,
Petitioner,

v.

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA,
Respondent.

No. CIV.A.H 01-0634

Dec. 4, 2001

Kenneth S. Marks, Susman Godfrey LLP, Houston, TX, Christopher F Dugan, Jones Day et al., Washington, DC, for Karaha Bodas Co., LLC.

Michael Lamar Brem, Baker Botts LLP, Houston, TX, Matthew D Slater, Cleary Gottlieb et al., Washington, DC, F Walter Conrad, Jr., Baker Botts, Houston, TX, Jonathan D Schiller, William A Isaacson, Boies & Schiller, Washington, DC, for Perusahaan Pertambangan Minyak Dan Gas Bumi Negara.

Eric Scott Lipper, Hirsch & Westheimer, Houston, TX, for Bank of America.

ATLAS, District Judge.

This action to enforce an international arbitral award is before the Court on Petitioner Karaha Bodas Company, L.L.C.'s Motion for Summary Judgment Confirming Arbitral Award ("KBC's Motion") [Doc. # 14] to which Respondent Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina") has responded.[1] Having reviewed the parties' briefs, all matters of record and the applicable authorities, the Court concludes that KBC's Motion should be **granted.**

I. *BACKGROUND FACTS*

KBC is a Cayman Islands limited liability company that contracted to develop the 400 MW Karaha Bodas Geothermal Project (the "Project") in West Java, Indonesia. Pertamina is an oil and gas corporation owned by the Government of the Republic of Indonesia and entrusted with the exploration and exploitation of geothermal resources

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[1] KBC also filed a Memorandum in Support of its Motion for Summary Judgment Confirming Arbitral Award [Doc. # 16] ("KBC's Memorandum"). Pertamina filed its Memorandum in Opposition to KBC's Motion for Summary Judgment ("Pertamina's Response") [Doc. # 29]. In addition, KBC filed a Reply [Doc. # 34] and Pertamina filed a Sur-reply [Doc. # 40]. PT. PLN (Persero) ("PLN"), was a Respondent at the arbitration and was originally named as a Respondent in this action. PLN was not served and has been dismissed from this case, [*see* Doc. # 44], pursuant to KBC's Notice of Dismissal [Doc. # 43].

and generation of electricity in Indonesia. PLN is a state-owned electric utility that supplies public electricity in Indonesia.

A. *The Project*

On November 28, 1994, Pertamina, PLN, and KBC entered into two contracts to establish their roles and obligations in the Project. Pursuant to the Joint Operations Contract ("JOC") between KBC and Pertamina, Pertamina was responsible for management of the geothermal operations and KBC was designated the contractor responsible for financing the Project and building, owning, and operating the generating facilities. *See* Petitioner's Exhibit ("PX") 2, JOC. The Energy Sales Contract ("ESC") among KBC, Pertamina, and PLN, obligated PLN to purchase from Pertamina the electricity generated by KBC's facilities for specified prices. *See* PX 3, ESC.

In almost identical provisions, both the JOC and the ESC required the parties to arbitrate any disputes in Geneva, Switzerland, pursuant to the Arbitral Rules of the United Nations Commission on International Trade Law (the "UNCITRAL Rules"). *See* JOC, Art. 13.2(a); ESC, § 8.2(a), at 18. Additionally, the arbitration provisions required the parties to appoint arbitrators within thirty days of a party's request to initiate arbitration. The JOC provided that "[e]ach party will appoint an arbitrator," while the ESC specified that "PLN on one hand, and COMPANY [KBC] and PERTAMINA on the other hand, will each appoint one arbitrator." *Id.* In the event that an arbitrator was not selected

within this thirty-day time frame, both contracts provided that an arbitrator would, by default, be appointed by the Secretary General of the International Center for Settlement of Investment Disputes ("ICSID") upon the request of any party. *Id.* The JOC and the ESC also contained virtually identical provisions limiting the parties' rights to appeal or otherwise bring legal proceedings concerning a dispute subject to the arbitration provisions. JOC, Art. 13.2(d); ESC, § 8.2(d), at 19.

The Government of Indonesia issued a Presidential Decree dated September 20, 1997 indefinitely postponing the Project. However, KBC continued development of the project based on Pertamina's and PLN's assurances that the Project suspension was temporary and would be restored. The Project was restored briefly by a Presidential Decree dated November 1, 1997, but yet another Presidential Decree dated January 10, 1998 (the "Presidential Decree") confirmed the indefinite postponement of the Project. As a result, Pertamina and PLN did not fulfill their contractual obligations to purchase the energy to be generated by KBC's facilities. In February 1998, KBC gave Pertamina and PLN notice that the Presidential Decree constituted an event of *Force Majeure* under both the JOC and the ESC. On April 30, 1998, KBC served its Notice for Arbitration.

B. *The Arbitration Proceedings*

In the Notice of Arbitration, KBC appointed

Professor Piero Bernardini[2] to serve as an arbitrator. Pertamina, however, did not designate an arbitrator in the allotted time of thirty days or thereafter. Nor did Pertamina contest KBC's selection at that time. By letter dated June 2, 1998, KBC notified the ICSID of Pertamina's inaction and requested the appointment of a second arbitrator pursuant to the default appointment provisions of the contracts. *See* PX 8. The ICSID questioned KBC concerning the consolidation of disputes under the JOC and the ESC and KBC's unilateral appointment of an arbitrator, and KBC responded by letter dated June 22, 1998. *See* PX 10. The ICSID confirmed receipt of the June 2 and June 22 letters. PX 11. In a June 29, 1998 letter to all parties, the ICSID recapped the prior correspondence, noted Respondents' failure to respond, and expressed its intent to grant KBC's request to appoint the second arbitrator. *See* PX 12. The ICSID also provided to the parties at this time the name of Dr. Ahmed El-Kosheri and his accompanying curriculum vitae,[3] and requested that any objections to the appointee be proffered by July 13, 1998. The ICSID sent all the preceding correspondence to PLN by courier and to Pertamina by fax and courier. *See* PX 15. Respondents did not object or respond to the potential appointment.[4] On

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[2] Prof. Bernardini was at the time Vice Chairman of the International Chamber of Commerce's International Court of Arbitration ("ICC") and Member of the London Court of International Arbitration. KBC's Memorandum, at 6-7.

[3] Dr. El-Kosheri was also a Vice Chairman of the ICC. KBC's Memorandum, at 7.

[4] KBC responded to the ICSID on July 1, 1998 (with copy to Respondents) that it had no objection to the appointment of Dr. El-Kosheri. *See* PX 13. The ICSID confirmed receipt of KBC's

July 13, 1998, having received no communications from Respondents, the ICSID notified them of its intent to appoint Dr. El-Kosheri, *see* PX 16, and made the appointment on July 15, 1998, copying all parties, *see* PX 17. Dr. El-Kosheri accepted the nomination on July 16, 1998. *See* PX 18. Pursuant to the JOC and the ESC, the two appointed arbitrators selected Mr. Yves Derains as Chairman of the arbitration panel (the "Tribunal"), and duly notified the parties. *See* PX 19.

Before proceeding on the merits of the case, PLN requested that the Tribunal first consider certain preliminary issues. *See* PX 21. The Tribunal heard the parties on these preliminary issues on November 19, 1998. Following the hearing, PLN and Pertamina, represented jointly by the same lawyers, submitted a joint memorial, *i.e.*, a memorandum, contending that KBC had improperly attempted to consolidate claims against different parties arising under separate agreements or putative agreements and that the Tribunal had been improperly constituted as the result of (1) the nature of a multi-party arbitration and (2) KBC's failure to honor the arbitrator nomination provisions of the ESC. *See* PX 23, Respondents' Memorial Regarding Preliminary Issues. Respondents participated in further argument on their preliminary objections at a hearing on May 31, 1999.

On October 4, 1999, the Tribunal issued a

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correspondence on July 2, with copies to Respondents. *See* PX 14. On July 10, the ICSID again forwarded the correspondence to Pertamina. *See* PX 15.

unanimous Preliminary Award, which held, in pertinent part, that: (1) the Tribunal was properly constituted; (2) KBC was entitled to file its claims, based on the J[illegible] and the ESC, in a single arbitration; and (3) [illegible]e Government of Indonesia was not a proper party to the arbitration. *See* PX 28, Preliminary Award, at 34.

KBC, after a brief extension of time, filed its Revised Statement of Claim on November 24, 1999. Thereafter, Pertamina and PLN sought, and were granted, a series of extensions to file a response to KBC's Revised Statement of Claim. The Tribunal also granted Respondents' March 6, 2000 joint request for a further extension to accommodate their change of counsel. Ultimately, pursuant to an agreement of the parties that was memorialized in Procedural Order No. 4, KBC filed a Revised Statement of Claim and First Memorial supplementing its claims on November 24, 1999; Respondents submitted a Reply and First Memorial on April 7, 2000; KBC submitted a Rebuttal and Second Memorial ("Rebuttal") on May 8, 2000; and Respondents submitted a Rejoinder to KBC's Rebuttal and Second Memorial on June 9, 2000. Procedural Order No. 4 set the hearing on the merits for June 19 through June 30, 2000. *See* PX 38.

Pertamina and PLN sought a further continuance and additional discovery after being served with KBC's Rebuttal, which they claimed contained new assertions and "significant elements of its case in chief" that had not previously been revealed. The Tribunal denied their requests. Further, the Tribunal determined that any adjustment to the

proceedings, that could be necessary, would be decided at the end of the hearing. PX 57.

The hearing on the merits began June 19, 2000 and closed on June 23, 2000. The hearing resulted in a transcript of over 800 pages reflecting extensive argument of counsel and live testimony from seven witnesses. Written witness statements were also submitted by the parties. The Tribunal noted that at the conclusion of the hearing, counsel "declared that they waived their respective requests for discovery," and confirmed that they had no objection beyond those already stated as to the conduct of the proceedings. PX 71, Final Award, at 12; *see* Transcript of Arbitration, Vol. V, at 807-08, 814. Post-hearing briefs were submitted on August 7, 2000. PX 71, Final Award, at 13.

On December 18, 2000, the Tribunal issued its Final Award which held that Pertamina and PLN had breached the ESC and that Pertamina had breached the JOC. *Id.* at 24, 47. The Tribunal reasoned that Respondents contractually assumed the risk of the harm created by the Presidential Decree. *Id.* at 19-20. Further, the Tribunal awarded KBC $111,100,000 to recoup its expenditures on the Project, $150,000,000 in future lost profits, and $66,654.92 in costs and expenses, plus four percent interest from January 1, 2001, until the date of full payment. *Id.* at 47.

KBC seeks enforcement of the Final Award in this proceeding pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958 ("New York Convention"),

codified at 9 U.S.C. § 201 *et seq.*

II. *STANDARD OF REVIEW*

The parties agree that the recognition and confirmation of international arbitral awards is governed by the New York Convention. *See* 9 U.S.C. § 201; *Schlumberger Tech. Corp. v. United States,* 195 F.3d 216, 217 (5th Cir.1999). "The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Imperial Ethiopian Gov't v. Baruch-Foster Corp.,* 535 F.2d 334, 335 (5th Cir.1976) (quoting *Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974)). The New York Convention is formally incorporated into United States law through implementing legislation found at 9 U.S.C. §§ 201-208.

In keeping with the expeditious nature of arbitration, this implementing legislation provides for a "summary procedure" for enforcement of foreign arbitral awards. *Imperial Ethiopian Gov't,* 535 F.2d at 335. Permissible defenses are few and "the court *shall confirm* the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." 9 U.S.C. § 207 (emphasis added); *Imperial Ethiopian Gov't,* 535 F.2d at 335-36. The defenses specified in the Convention are narrowly

construed to give effect to the Convention's goal of encouraging the timely and efficient enforcement of awards. *In re Arbitration Between Trans Chem. Ltd. and China Nat'l Mach. Import and Export Corp.*, 978 F.Supp. 266, 310 (S.D.Tex.1997), *aff'd*, 161 F.3d 314 (5th Cir.1998). In short, there is a "general pro-enforcement bias" manifested in the Convention. *American Const. Mach. & Equip. Corp. v. Mechanised Const. of Pakistan, Ltd.*, 659 F.Supp. 426, 428 (S.D.N.Y.1987).

The New York convention contains only seven possible defenses. 9 U.S.C. § 201, Art. V. Recognition and enforcement of the award may be refused if the losing party furnishes proof that: (a) the parties to the agreement were under some incapacity or the agreement was invalid under the law to which the parties have subjected it; (b) the party against whom the award was invoked was not given proper notice of the appointment of the arbitrator, the arbitration proceedings, or was otherwise unable to present his case; (c) the final award deals with a difference not contemplated by the submission to arbitration or is beyond the scope of the submission to arbitration; (d) the composition of the arbitral authority or the arbitral procedure was improper and not in accordance with the agreement of the parties; or (e) the award has not yet become binding or has been stayed by a competent authority. *Id.*, Art. V(1). A court also may refuse confirmation on a arbitral award if it finds (a) the subject matter of the difference between the parties is not capable of settlement by arbitration under the law of the enforcing state or (b) enforcement of the award is or would be contrary to the public policy of the enforcing

state. *Id.*, Art. V(2).

Although it is necessary for the Court to analyze potential New York Convention defenses raised by Pertamina, "[a]bsent extraordinary circumstances, a confirming court is not to reconsider the arbitrator's findings." *Europcar Italia v. Maiellano Tours,* 156 F.3d 310, 315 (2d Cir.1998). A mistake in fact or law is insufficient to refuse confirmation of an arbitral award. *Id.* at 316.

The burden of proof in confirmation proceedings rests on the party defending against enforcement of the arbitral award, in this case, Pertamina. *Imperial Ethiopian Gov't,* 535 F.2d at 336;*Empresa Constructora Contex Limitada v. Iseki, Inc.,* 106 F.Supp.2d 1020, 1024 (S.D.Cal.2000); *American Const. Mach. & Equip. Corp.,* 659 F.Supp. at 428.

III. *CONTRACTUAL WAIVER OF OPPOSITION TO ENFORCEMENT*

As a threshold matter, the Court must determine whether Pertamina agreed in the JOC or ESC to forgo any defense against enforcement of the arbitration award. KBC contends that the following language, present in both contracts, prohibits Pertamina from opposing KBC's enforcement action:
The award rendered in any arbitration commenced hereunder shall be final and binding upon the Parties and judgment thereon may be entered in any court having jurisdiction for its enforcement. The Parties hereby renounce their right to appeal from the decision of the arbitral panel and agree that in accordance with Section 641 of the Indonesian Code

of Civil Procedure neither Party shall appeal to any court from the decision of the arbitral panel and accordingly the Parties hereby waive the applicability of Articles 15 and 108 of Law No. 1 of 1950 and any other provision of Indonesian Law and regulations that would otherwise give the right to appeal the decision of the arbitral panel. In addition, the Parties agree that neither Party shall have any right to commence or maintain any suit or legal proceeding concerning a dispute [hereunder until the dispute[5]] has been determined in accordance with the arbitration procedure provided for herein and then only to enforce or facilitate the execution of the award rendered in such arbitration. JOC, Art. 13(d); ESC, § 8(d). Pertamina contends that this provision does not constitute a waiver of its rights under the New York Convention.

Neither party has cited a case analyzing language precisely like that in the contracts at issue here. KBC relies on *In re Arbitration Between Chromalloy Aeroservices and Arab Repub. of Egypt*, 939 F.Supp. 907 (D.D.C.1996). However, the holding in that case is not precisely on point. In that case, the United States District Court for the District of Columbia found that an Egyptian ruling nullifying an arbitration award was improper because it was "the clear intent of the parties that any arbitration of a dispute arising under the Contract is not to be appealed to any court." *Id.* at 912. While *Chromalloy* supports the conclusion that language such as that quoted above constitutes a waiver of Pertamina's

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[5] The bracketed text inexplicably is absent from the JOC, but the omission does not affect the meaning.

right to appeal the arbitration award, the current proceeding is not an appeal but an enforcement action. *Chromalloy* did not address the affect of such language on a party's right to raise New York Convention defenses in opposition to an enforcement proceeding.

Pertamina cites *M & C Corp. v. Erwin Behr GmbH & Co.*, 87 F.3d 844, 847 (6th Cir.1996), for the proposition that the contract provisions quoted above do not constitute a waiver of its defenses under the New York Convention. The contract at issue in *M & C Corp.*, provided that "[t]he arbitral award shall be final" and that the parties have "waived their right to any form of appeal." *Id.* The *M & C Corp.* court determined that notwithstanding the contractual language at issue in that case, the party against whom the award was rendered was entitled to contest the validity and enforceability of the award pursuant to the New York Convention. *Id.* The Sixth Circuit was concerned that to hold otherwise "would insulate [arbitration] judgments from judicial review even in cases involving fraud, procedural irregularities, or exertion of improper influence upon arbitrators." *Id.*

The contractual provisions at issue here are broader than the one in *M & C Corp.* in that they limit not only appeals but the "right to commence or maintain any suit or legal proceeding concerning a dispute hereunder." The Court nevertheless concludes that Pertamina is entitled to rulings on the arguments it raises. The present suit is one in which KBC seeks to enforce an arbitration award which Pertamina opposes. The necessity of a suit to enforce

the award was envisioned by the drafters of the JOC and ESC. Implicitly, the parties thus recognized the right to defend against such relief under the New York Convention. Had the drafters intended to deprive an unsuccessful party of all New York Convention defenses in an enforcement proceeding, the drafters could and should explicitly have said so.

The defenses permitted by the New York Convention ensure that arbitral awards meet minimum procedural standards for protecting the litigants' rights. The defenses recognized by the New York Convention do not permit the Court to address the merits of the dispute submitted to arbitration. *See Schlumberger,* 195 F.3d at 220. The Court concludes that Pertamina has not waived its New York Convention defenses to enforcement of the arbitral award. Thus, the Court will consider the substantive points raised by Pertamina's Response.

IV. *PERTAMINA'S NEW YORK CONVENTION DEFENSES*

Article V of the New York Convention specifies seven limited exceptions to the mandatory enforcement of foreign arbitration awards. "Absent a convincing showing that one of these narrow exceptions applies the arbitral award will be confirmed." *Trans Chem.,* 978 F.Supp. at 309; *see Yusuf Ahmed Alghanim & Sons v. Toys "R" Us,* 126 F.3d 15, 20 (2d Cir.1997). Pertamina asserts three of the enumerated New York Convention defenses here: (1) the composition and procedure of the Tribunal violated the terms of the parties' agreements (Art. V(1)(d)); (2) the Tribunal deprived Pertamina of due

process (Art. V(1)(b)); and (3) the arbitral award violates public policy (Art. V(2)(b)).

A. *Alleged Violations of the Parties' Agreements*

Article V, § 1(d) of the Convention provides a defense against confirmation of an arbitral award if the respondent can prove that "the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place." 9 U.S.C. § 201, Art. V(1)(d). At least one district court faced with an objection to enforcement of an arbitral award based on Article V(1)(d) has concluded that because of the clear "pro-enforcement bias" of the New York Convention, it is appropriate to "set aside an award based on a procedural violation only if such violation worked substantial prejudice to the complaining party." *Compagnie des Bauxites de Guinee v. Hammermills, Inc.*, No. 90-0169, 1992 WL 122712, *5 (D.D.C. May 29, 1992); *American Const. Mach. & Equip. Corp.*, 659 F.Supp. at 428. The Court finds the *Hammermills* decision well-reasoned and adopts it as persuasive authority. The Court therefore holds that Pertamina must show that there is a violation of an arbitration agreement between the parties and that the violation actually caused Pertamina substantial prejudice in the arbitration.

Pertamina argues that the Final Award should not be confirmed because first, the Tribunal improperly consolidated the disputes under the JOC and ESC into one arbitral proceeding and, second,

the Tribunal was improperly constituted because KBC unilaterally chose an arbitrator in violation of the terms of § 8.2 of the ESC.[6]

1. Consolidation of KBC's Claims Under the JOC and ESC

Pertamina argues that the arbitral procedure was contrary to the parties' agreements because neither the JOC or the ESC expressly allows consolidation. Because arbitration is a product of contract, courts generally are reluctant to allow consolidation unless the parties consent. *See Government of United Kingdom of Great Britain v. Boeing Co.*, 998 F.2d 68, 72 (2d Cir.1993) (district courts do not have authority to consolidate arbitrations absent the parties consent).

In this case, the Tribunal approved a single arbitration based on the "connexity" of KBC's claims and the integration of the two contracts.[7] *See* PX 28,

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[6] KBC characterizes Pertamina's arguments as "arbitrability" issues, and argues that Pertamina cannot raise such issues here because it agreed to submit them for decision by the Tribunal. The Court disagrees. Disputes concerning breaches of the contracts are encompassed by the contracts' arbitration clauses. To the extent that Pertamina raises issues as to whether the arbitration procedures were in accordance with the parties' agreements, these matters are not strictly arbitrability questions. However, KBC's contention that these contract issues were fully aired before the Tribunal is well-taken. Absent some clear reason under the New York Convention, the Court will enforce the Tribunal's award.

[7] "Connexity," as explained in the Preliminary Award, relates to the legal relations between KBC and Pertamina on the basis of the JOC on the one hand, and between KBC, Pertamina and

Preliminary Award, at 26. The Tribunal found that "the parties did not contemplate the performance of two independent contracts, but the performance of a single project consisting of two closely related parties." *Id.* at 27. The Tribunal had "not the slightest doubt" that a single arbitration was appropriate due to the integration of the two contracts and the fact that the Presidential Decree, the consequences of which are at the origin of the dispute, affected both of them. *Id. Compare United Kingdom,* 998 F.2d at 69 (reversing district court consolidation of arbitration proceedings involving separate, distinct agreements between the United Kingdom and two different parties, absent the parties' agreement).

The Tribunal based its integration finding on the facts that the contracts were signed on the same day; that the JOC expressly provided that the ESC "shall be an integral part of this contract, and to the extent the provisions of the Energy Sales Contract obligate the Parties hereto, shall be deemed incorporated into this contract for all purposes"; and that the ESC provided that it and the JOC together constitute the entire agreement between the parties. PX 28, Preliminary Award, at 26-27. In essence, the Tribunal concluded that the nature of the contracts at issue is such that the parties contemplated arbitration in a single proceeding. This Court strongly concurs. In addition, it is obvious that separate arbitrations of the matters in dispute among the parties under the JOC and ESC would

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PLN on the basis of the ESC on the other hand. PX 28, Preliminary Award, at 26.

have required substantial duplication of evidence on liability, damages and defensive issues. Pertamina, the only Respondent in this enforcement proceeding,[8] is a party to both the JOC and the ESC. The two Respondents in the arbitration, Pertamina and PLN, were represented by the same counsel at all times during the arbitration. Further, Pertamina has not cited any case in which consolidation was deemed to be in error under similar circumstances.[9]

The Tribunal acknowledged that "the position of each party has to be considered independently when discussing the substance of the case, on the basis of their respective legal and contractual situations" (*Id.* at 28), and carefully adhered to this precept in all its rulings. There is no evidence that the Tribunal failed to distinguish between the positions of Pertamina and PLN in the arbitration. Indeed, the Tribunal

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[8] *See supra* note 1.

[9] One treatise, cited by Pertamina in support of its argument that there can be no consolidation absent consent, acknowledges "there is strong support for the view that a judicially consolidated arbitration would be enforceable under the New York Convention where allowed by the governing local law as long as all parties have agreed (1) to arbitration and (ii) to the same arbitral jurisdiction. Where the parties have in effect agreed to a *lex arbitri*, it is reasonable to infer that they have agreed to be governed by any mandatory requirements of that law regarding consolidation which may override the express choice of the parties in matters of composition and procedure of the arbitral tribunal." ALLAN REDFERN, MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 187 (2d Ed.1991). In this case, the parties agreed to arbitration and that the arbitration would be conducted in Geneva, Switzerland. Thus, there is a legal foundation for the Tribunal's application of the Swiss law of "connexity" to the consolidation issue

went to great lengths to address the contentions of each separately, even though Pertamina and PLN chose to submit joint memorials and were represented by the same counsel at the arbitration hearing. There is simply no showing that these findings by the Tribunal are in error and should not be enforced.

In any event, Pertamina has not demonstrated that it suffered any loss of contract rights from the consolidation. The Court concludes that the consolidation did not violate the parties' agreements. Pertamina has not proven any prejudice from the consolidation. Pertamina thus has failed to meet its burden under the New York Convention to show a violation of Article V(1)(d) that precludes enforcement of the Final Award.

2. Appointment of Arbitrators

Pertamina also contends that the procedure used to appoint the arbitrators for the arbitration proceedings violated the ESC.

The ESC provides for the appointment of arbitrators as follows:

> PLN on one hand, and COMPANY [KBC] and PERTAMINA, on the other hand, will each appoint one arbitrator, in each case within thirty (30) days after the date of a request to initiate arbitration, who will then jointly appoint a third arbitrator within thirty (30) days of the date of the appointment of the second arbitrator, to act as Chairman of the

> Tribunal. Arbitrators not appointed within the time limits set forth in the preceding sentence shall be appointed by the Secretary General of the International Center for Settlement of Investment Disputes, upon the request of any Party.

ESC, § 8.2(a). The JOC's procedure for arbitrators' appointment is slightly different:

> Each Party [KBC and Pertamina] will appoint an arbitrator within thirty (30) days after the date of a request to initiate arbitration, who will then jointly appoint a third arbitrator within thirty (30) days of the date of the appointment of the second arbitrator, to act as Chairman of the Tribunal. Arbitrators not appointed within the time limits set forth in the preceding sentence shall be appointed by the Secretary General of the International Center for Settlement of Investment Disputes.

JOC, Art. 13.2(a). Thus, each contract provided for the appointment of arbitrators by the ICSID in the event any party failed to meet its own obligation to do so. There is no question that the Tribunal was constituted in accordance with the express terms of the JOC. The disputed issue is whether KBC's unilateral designation of the first arbitrator violated the ESC.

The Tribunal rejected the Respondent's position that in all disputes under the ESC, KBC *and* Pertamina must jointly appoint one arbitrator while PLN appointed the other. *See* PX 28, Preliminary

Award, at 30. The Tribunal found that the ESC arbitration clause applies to the entire contract, not only to disputes aligning KBC and Pertamina on one side against PLN, and that therefore it defied common sense, in a dispute between KBC and Pertamina, to oblige KBC and Pertamina to jointly appoint an arbitrator. *See id.* Because the ESC does not expressly address the method for appointing arbitrators in the KBC v. Pertamina situation, the Tribunal found that the appointment of arbitrators must be made in accordance with UNCITRAL Arbitration Rules, which the parties incorporated into the ESC and which were satisfied in this case.[10] To the extent that the contract interpretation issue is an arbitrable one, the Court sees no reason under the New York Convention to reject the Tribunal's reasoned analysis of the ESC.

In addition, looking at the issue afresh, the Court concludes that Pertamina has not established a violation of the ESC in regard to the first (or any other) arbitrator's selection. Pertamina has not claimed, before the Tribunal or this Court, that it failed to receive KBC's April 30, 1998 Notice of Arbitration. That Notice included Prof. Bernardini as KBC's choice of arbitrator. Pertamina also has not claimed that it did not receive the ICSID's June 29

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[10] Section 8.2(a) of the ESC provides that any dispute arising under that contract "shall finally be settled by an arbitral tribunal (the "Tribunal") under the UNCITRAL arbitration rules contained in Resolution 31/98 adopted by the United Nations General Assembly on December 15, 1976 and entitled 'Arbitration Rules of the United Nations Commission on International Trade Law' as in force at the time such arbitration commenced."

and July 13, 1998 letters, *see supra,* at 4, informing Pertamina of the ICSID's intention to appoint Dr. El-Kosheri as the second arbitrator.[11] The ICSID's action thus also indicated its acceptance of Prof. Bernardini as the first arbitrator. Nonetheless, Pertamina lodged no objection to the appointment of either Prof. Bernardini or Dr. El-Kosheri.[12]

The Court also rejects Pertamina's contention that KBC's nomination of an arbitrator without Pertamina's consent violates the ESC because Pertamina's construction of the selection procedure renders the ESC's arbitration provision illusory. Under Pertamina's interpretation, Pertamina would hold the unilateral power to prevent the arbitration of disputes between it and KBC arising under the ESC simply by refusing to select or comment on KBC's proposals for an arbitrator. That is not a reasonable interpretation of the expressed intent of the parties as set forth in the ESC. The parties intended that in the event a party failed to name an arbitrator within thirty days of the request for arbitration, the ICSID would do so. In effect, that is the scenario that transpired in this case. KBC

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[11] Pertamina apparently argued to the Tribunal that it did not name an arbitrator because it was contesting the legitimacy of the arbitration and further contended that it did not receive certain of the correspondence from the ICSID regarding KBC's request that the ICSID appoint the second arbitrator. *See* PX 28, Preliminary Award, at 8. Pertamina does not assert these arguments before the Court.

[12] In fact, Pertamina expressly informed the Tribunal in its Preliminary Memorial that it had no objection to Dr. El-Kosheri, the arbitrator selected by the ICSID. *See* PX 23, at 36. Thus, Pertamina's objection is solely to fact that KBC was allowed to select one of the arbitrators.

nominated an arbitrator. Pertamina had ample notice of this act. The time for Pertamina to object to KBC's selection or for Pertamina to have asserted its right to participate in the first arbitrator's appointment was within thirty days of receiving KBC's Notice of Arbitration and arbitrator selection. In the absence of an objection from Pertamina, nothing in the ESC precluded the ICSID from accepting KBC's nomination for the first arbitrator.[13] This procedure materially complies with the terms of the ESC.[14] Pertamina's belated arguments that Prof. Bernardini was improperly selected are a futile attempt to avoid consequences of its strategic decisions not to object timely to KBC's selection and to decline to participate in the selection of an arbitrator.

Moreover, there is no evidence-and Pertamina does not even allege-that Prof. Bernardini, the KBC-selected arbitrator, was biased against Pertamina.

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[13] It is noted that Pertamina still lodged no objection to either the first or the second individual appointed arbitrator.

[14] There are other viable interpretations of the ESC arbitration clause and the parties' contracts generally that support the procedure used in this dispute. For instance, because the ESC and JOC are expressly integrated contracts, they must be interpreted together to determine the intent of the parties. It is arguable that the parties to the ESC intended to be bound by the arbitration provision (including the provision for the selection of arbitrators) of the JOC when a dispute involved that contract. Under that interpretation, the arbitration provision of the ESC would be operative only in the event the arbitration did not include issues arising under the JOC. Alternatively, the contract provisions may be harmonized by applying the ESC methodology only when KBC and Pertamina both were adverse to PLN and not to each other.

Indeed, to the extent Pertamina must show prejudice from the contract violation to support this New York Convention defense, Pertamina's evidence fails even if one assumes that Prof. Bernardini unfairly favored KBC in the arbitration. All the findings and awards were unanimous. *See* PX 28, Preliminary Award; PX 71, Final Award. There is no evidence or even any allegation that the other two arbitrators were not neutral, were biased, or had any conflict of interest. Therefore, Pertamina cannot show that the arbitration selection procedure worked any prejudice to Pertamina. *See Compagnie des Bauxites de Guinee,* 1992 WL 122712, at *5.

The Court accordingly holds that Pertamina has not met its burden to show either that the composition of the Tribunal violated the parties' agreements or that the composition caused Pertamina substantial prejudice.

B. *Alleged Due Process Violations*

The New York Convention allows denial of award confirmation if the party against whom it is invoked can prove that it "was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case". 9 U.S.C. § 201, Art. V(1)(b). This enumerated defense "essentially sanctions the application of the forum state's standards of due process." *Iran Aircraft Indus. v. Avco Corp.,* 980 F.2d 141, 145-46 (2d Cir.1992). The fundamental requirement of due process is the opportunity to be heard at a "meaningful time and in meaningful manner." *Id.* at 146. Enforcement of the award may be denied only if

there was a procedural infirmity that rendered the proceedings fundamentally unfair and caused prejudice to the complaining party. *Hammermills,* 1992 WL 122712, at *5. A fundamentally fair hearing is one that meets the minimum requirements of fairness: adequate notice, a hearing on the evidence, and an impartial decision by the arbitrators. *See Generica Ltd. v. Pharm. Basics,* 125 F.3d 1123, 1130 (7th Cir.1997); *Sunshine Mining Co. v. United Steelworkers,* 823 F.2d 1289, 1295 (9th Cir.1987). The right to due process does not, however, encompass the procedural rights guaranteed by the Federal Rules of Civil Procedure. *Imperial Ethiopian Government,* 535 F.2d at 337;*Empresa,* 106 F.Supp.2d at 1026;*Trans Chem.,* 978 F.Supp. at 310 ("The right to due process does not include the complete set of procedural rights guaranteed by the Federal Rules of Civil Procedure. By agreeing to arbitration [the respondent] subjected itself to its advantages and disadvantages.").

Pertamina argues that it was not afforded due process in the arbitration because the Tribunal (1) failed to grant a continuance and denied it further discovery six weeks before the scheduled hearing, and (2) "reversed," without notification, the Preliminary Award. The first of these alleged procedural deficiencies relates to Pertamina's alleged inability to respond adequately to issues raised in KBC's Rebuttal briefing. In connection with its arguments regarding discovery, Pertamina further asserts that it is entitled to discovery in this federal court proceeding pursuant to Federal Rule of Civil Procedure 56(f) before the Court rules on KBC's summary judgment motion. The second alleged

procedural deficiency relates to Pertamina's perception that the Final Award is contrary to the Tribunal's Preliminary Award, which found that the Government of Indonesia was not a proper party to the arbitration and that Pertamina could not be held liable for the acts of the Government of Indonesia. KBC contends that Pertamina received a full and fundamentally fair hearing.

1. Denial of Request for Continuance and Discovery

Tribunal's Denial of Continuance and Discovery Requests.-Six weeks before the hearing, in early May 2000, KBC filed a Rebuttal with the Tribunal. Pertamina contends that it was prejudiced by KBC's Rebuttal because KBC allegedly included an entirely new position on the financing of the Project, made new allegations of the conduct constituting Pertamina's breach, relied on newly-submitted awards in the arbitrations known as *Himpurna* and *Patuha,* identified additional witnesses, and presented new documentary evidence. Pertamina asserts that it was required to secure new experts and fact witnesses and to impose upon its existing experts and fact witnesses to review KBC's Rebuttal submissions in four weeks. Pertamina further contends it had insufficient time post-Rebuttal to prepare for the hearing.

In fact, KBC's Rebuttal did not assert any new claims or new legal theories for recovery. KBC's Rebuttal responded to specific defenses asserted in Respondents' Reply by specifying additional facts, argument, and authority supporting its claims,

including the *Himpurna* and *Patuha* awards. The Court is aware of no rule or law that obligated KBC to specify in its Revised Statement of Claim all evidence it intended to submit, and every argument it intended to make, ultimately to support its claims at the hearing. Pertamina had notice of KBC's claims, and should have anticipated that KBC would contest its defenses. The arbitration proceeding was pending for approximately two years. Pertamina had ample time to prepare its case. Moreover, the fact that KBC's Rebuttal was submitted only six weeks before the hearing was the direct result of Respondents' requests for extensions of time to submit their Reply to KBC's November 1999 Revised Statement of Claim. Pertamina was aware in mid-March 2000, when the Tribunal granted its latest request for an extension of time, that the hearing date remained set for June 19, 2000. *See* PX 38, Procedural Order No. 4. Pertamina did not file its Reply to KBC's Revised Statement of Claim until April 2000, which explains the timing of KBC's Rebuttal.

To the extent Pertamina also contends that it was unfairly denied discovery on the "highly material" issue of KBC's ability to finance the Project, the record does not support the contention. During the two years preceding the filing of the Rebuttal, Pertamina had requested no discovery on this "highly material" issue, even though KBC expressly sought lost profits in its Revised Statement of Claim in November, 1999, and even though Pertamina responded to KBC's claim by arguing that KBC was entitled to no damages because it could not have completed the Project for reasons independent of the

Presidential Decree. *See* PX 40, at 6. Moreover, even without the requested discovery, Pertamina presented substantial evidence on the Indonesian economy (information easily accessible to Pertamina and PLN), and expert opinions on the availability of financing, on the size of the "geothermal reserve," and on the "useable resource." *See* PX 39, 41, 42, 43, and 44. Pertamina's counsel thoroughly cross-examined KBC's witnesses on the issues raised in KBC's Rebuttal. Pertamina, which bears the burden to prove that the hearing was fundamentally unfair, does not identify specific topics or other matters it was prevented from raising; nor does Pertamina identify anything it would have done differently if it had more preparation time. Pertamina refers to the broad, general discovery requests attached to its letter of submission to the arbitrators, *see* PX 54, but it has not identified a single specific piece or type of evidence it believes exists that would have aided in its defense on these issues. Pertamina has failed to establish under the New York Convention that it was denied a fundamentally fair hearing, and thus denied due process, as a result of the lack of discovery or a continuance after KBC's Rebuttal.[15]

In addition, the transcript of the June 23, 2001 proceedings (the last day of the arbitration hearing) establishes that Respondents informed the Tribunal that they were satisfied with the record as it existed, and that they abandoned their pre-hearing discovery

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[15] The issue is not whether this Court would have granted the discovery or the continuance. The question is whether the procedures employed met the minimum requirements of fairness.

requests:

> MR. CHAIRMAN: May we, before departing have a discussion on what is going to be done now in these proceedings, and we see two items on this particular agenda. There were first a certain number of procedural objections which have been made before this hearing, and in the procedural order we said that this would be decided after the hearing. In summary, there was a request for discovery from one side, and there was objection to the submission of this arbitral award and the business of confidentiality. You remember this discussion.
>
> MR. MISHKIN [Respondents' Attorney]: I think there was a request for discovery from both sides.
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> MR. CHAIRMAN: Our first question is are these requests maintained, all of them, part of them, because we would like to know on what we have to decide.
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> MR. MISHKIN: May I just give you my views on that question.
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> MR. CHAIRMAN: Yes.
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> MR. MISHKIN: And that is that the purpose of discovery is to prepare for the hearing, it is not to supplement the record after the hearing. So I think the discovery requests are moot, and if discovery is now permitted, then you have to re-open the proceedings and so on. So I treated, notwithstanding the fact that it was theoretically open, I treated this request as effectively being denied, and we went forward. Our request went to the purported financial

> ability, the purported financing that would have been made available and other things, and *I think the record on that has been fully made. I am prepared to rest on that record,* and so *I think discovery requests should no longer be in the picture.*
> MR. SCHILLER [Petitioner's Attorney]: I agree.
> PROF. BERNARDINI [Arbitrator]: And you agree on their withdrawing their request. What about yours?
> MR. SCHILLER: I withdraw my request.

Hearing Transcript, Vol. V, at 807-08 (emphasis added). Thus, Pertamina expressly abandoned its arguments concerning the timing and other alleged procedural defects in the arbitration proceedings.

In any event, these procedural decisions were well within the reasonable exercise of the Tribunal's discretion. These decisions did not prevent Pertamina from having a meaningful hearing. They do not rise to the level of fundamental unfairness necessary to deny enforcement of the arbitration award.

Pertamina's Rule 56(f) Request for Discovery.-As another avenue in its due process defense under the New York Convention, Pertamina requests discovery in this lawsuit under the Federal Rules of Civil Procedure. Specifically, Pertamina requests, as it did before the Tribunal, additional discovery related to KBC's ability to finance the Project. KBC opposes Pertamina's request, contending that it is improper under applicable law

and the New York Convention, and is unwarranted factually. Pertamina's request for discovery is denied.

Rule 56(f) of the Federal Rules of Civil Procedure permits a district court, upon a proper showing by the party seeking Rule 56(f) relief, to delay consideration of a motion for summary judgment pending additional discovery. FED. R. CIV. P. 56(f); *Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1441 (5th Cir.1993). "In order to obtain a continuance of a motion for summary judgment for discovery purposes, a party must set forth some statement to the court indicating why additional discovery is necessary and 'how additional discovery will create a genuine issue of material fact.' " *Canady v. Bossier Parish School Bd.*, 240 F.3d 437, 445 (5th Cir.2001) (citing *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 28 F.3d 1388, 1395 (5th Cir.1994)). A party "may not simply rely on vague assertions that additional discovery will produce needed, but unspecified facts." *Krim,* 989 F.2d at 1442 (internal citations omitted). It must show (1) why additional discovery is needed and (2) how that discovery will create a genuine issue of material fact. *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 535 (5th Cir.1999) (citing *Krim,* 989 F.2d at 1442). If the party has not diligently pursued discovery, however, it is not entitled to relief under Rule 56(f). *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,* 28 F.3d 1388, 1397 (5th Cir.1994).

Pertamina argues that this Court's review of its New York Convention defenses involves legal issues subject to *de novo* review, but concedes that the

Court must defer to the Tribunal's factual findings. Pertamina's Response, at 2. Pertamina also concedes that the grounds for review under the New York Convention typically relate to the existing record and do not otherwise depend on discovery. Pertamina's Response, at 50 (citing *Frere v. Orthofix, Inc.*, Nos. 99CIV4049 and 00CIV1968, 2000 WL 1789641, at *4-*8 (S.D.N.Y. Dec.6, 2000)). Discovery is particularly inappropriate in enforcement proceedings under the New York Convention. *See Imperial Ethiopian Gov't*, 535 F.2d at 337 ("the loser in arbitration cannot freeze the confirmation proceedings in their tracks and indefinitely postpone judgment by merely requesting discovery.").

As noted above, the right to due process protected by the New York Convention does not encompass the procedural rights guaranteed by the Federal Rules of Civil Procedure. *See Imperial Ethiopian Government*, 535 F.2d at 337;*Empresa*, 106 F.Supp.2d at 1026;*Trans Chem.*, 978 F.Supp. at 310 ("The right to due process does not include the complete set of procedural rights guaranteed by the Federal Rules of Civil Procedure. By agreeing to arbitration [the respondent] subjected itself to its advantages and disadvantages."). Pertamina had notice at least as early as November 24, 1999, upon KBC's submission of its Revised Claim, that KBC was seeking lost profits.[16] *See* PX 31, Revised Statement, at 37.

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[16] In its Notice of Arbitration, KBC claimed it was seeking damages from PLN and Pertamina for breach of both the JOC and ESC. *See* PX 6, Notice of Arbitration, ¶ 17(A). It was apparent at that point that KBC's ESC claim likely would include lost profits, and thus raised the issue of financing,

Indeed, the issue of available financing was raised and thoroughly addressed by Pertamina, without the benefit of any discovery, in its Reply to KBC's Revised Statement, *see* PX 40, Respondents' Reply, at 6, and through witness statements. There is no reason to allow the discovery Pertamina requests at this enforcement stage of the proceedings.

Finally, the Court's conclusion that the requested discovery is unwarranted at this stage is supported by statements of Pertamina's counsel at the conclusion of the arbitration hearing. Counsel stated that "discovery is to prepare for the hearing, it is not to supplement the record after the hearing" and that Pertamina's discovery request "went to the purported financial ability, the purported financing that would have been made available and other things, and I think the record on that has been fully made. I am prepared to rest on that record, and so I think the discovery requests should no longer be in the picture." Hearing Transcript, Vol. V, at 807-08.

Even if discovery were appropriate at this late stage in the parties' dispute, and even if the Tribunal made a factual or legal error, Pertamina has failed to meet its Rule 56(f) burden to demonstrate why the requested discovery is material. This Court may not disturb the Tribunal's ruling absent a due process violation, or other ground under the New York Convention. Pertamina has failed to show that the evidence that could be discovered likely would lead to a finding that the arbitration process was

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because the ESC contemplated that the Project would be completed and electricity sold to PLN.

fundamentally unfair, constituted a due process violation for some other reason, or violated the New York Convention in some other way. Thus, Pertamina's discovery request under Rule 56(f) is denied.

In sum, Pertamina has failed to meet its burden to show that circumstances warrant opening the record for additional evidence in this enforcement proceeding. Thus, the Court rejects Pertamina's request for discovery and its argument that KBC's motion for summary judgment is premature.

2. "Reversal" of the Preliminary Award

Pertamina contends that it was denied due process when the Tribunal found it liable for abiding by the requirements of the Presidential Decree despite having determined in the Preliminary Award that a "Government Related Event" is "not deemed to be a breach of contract by Pertamina or PLN but a Force Majeure event excusing KBC's non-performance." PX 28, Preliminary Award, at 19. Further, Pertamina contends that because the Tribunal explicitly stated that the matters to be considered at the hearing on the merits were to be "issues not resolved in this Preliminary Award," it did not have notice that it would be held liable for breach of contract. Pertamina's position misinterprets both the Preliminary Award and the Final Award, and defies logic. The Preliminary Award found that the Government of Indonesia was not a party to the contracts and that Pertamina was not the alter-ego of the Government. However, it expressly recognized that Pertamina *would* bear the

risk of loss arising from a Government Related Event:

> [T]he parties took care of the close relation of PERTAMINA and PLN with the [Government]. They included in both contracts a definition of "Government [R]elated Event" and, in both contracts, the Force Majeure clause indicates that a "Government [R]elated Event" is an event of Force Majeure with respect to KBC only. This has two consequences for the interpretation of the parties' intention. On the one hand, they were acknowledging that PERTAMINA and PLN had such a close relation with the GOI that a decision of the latter was not a Force Majeure event for them; on the other hand, they were confirming that the [Government] was not a party to the contracts since a governmental decision which prevents KBC to perform its obligations is not deemed to be a breach of contract by PERTAMINA or PLN but a Force Majeure event excusing KBC's non performance.

Id.

In the Final Award, the Tribunal found that Pertamina had a contractual responsibility to make KBC whole for a "Government [R]elated Event," not that the Presidential Decree constituted a breach of contract by Pertamina. The Tribunal stated:

> [The Preliminary Award] was not meant to express any view as to the consequences for

> PERTAMINA or PLN of a Governmental decision which prevents the performance of the Contracts. Contrary to Respondents' point of view, the fact that they are not responsible for the Governmental decision to prevent the performance of the Contracts does not exempt them from liability if they do not perform their own obligations in abiding by the decision. The Governmental decisions, in this case the Presidential Decrees n. 39/1997 and n. 5/1998, do not amount to a breach of Pertamina's and PLN's obligations. However, since a Governmental event is not a Force Majeure event for them, their non-performance has no legitimate excuse and must be considered as a breach of contract.
>
> Such distinction is far from being artificial, as the Respondents contend. It applies each time a party is actually prevented from performing its contractual obligations by an event which it cannot invoke as Force Majeure due to the existence of provisions to that effect in the contract or by application of the law.

PX 71, Final Award, ¶¶ 56-57.

Moreover, the Preliminary Award must be read in context with the Notice of Arbitration and all subsequent pleadings by claimant KBC and Respondents. KBC clearly and directly sought relief for alleged breaches of contract. In these circumstances, if Pertamina truly thought the Preliminary Award eliminated its liability for non-performance, then there was nothing left to

arbitrate. At the very least, Pertamina had ample notice that the Tribunal would be hearing all of the matters addressed in KBC's Revised Statement of Claim, submitted *after* the Preliminary Award and approximately seven months before the hearing on the merits. Pertamina responded to those claims in its briefing to the Tribunal and thus demonstrated its awareness at the time of the matters in issue. Pertamina's self-serving, erroneous interpretation of the Preliminary Award, does not support a finding that the arbitration was fundamentally unfair. Indeed, Pertamina has failed to demonstrate that the Tribunal's own interpretation of its order is in any way unfounded.

C. *Alleged Violations of Public Policy*

The Convention allows confirmation of an award to be refused if "the recognition or enforcement of the award would be contrary to the public policy of that country." 9 U.S.C. § 201, Art. V(2)(b). Pertamina asserts that the Final Award is contrary to United States public policy because it (1) violates the internationally recognized doctrine of "abuse of rights" by awarding lost profits to KBC; and (2) holds Pertamina liable for refusing to violate governing Indonesian law.

Application of the public policy exception will succeed in only the narrowest of circumstances; indeed, vacating an arbitral award under this defense requires a violation of the "most basic notions of morality and justice." *Slaney v. Int'l Amateur Athletic Fed'n,* 244 F.3d 580, 593 (7th Cir.2001) (quoting *Fotochrome, Inc. v. Copal Co.*, 517

F.2d 512, 516 (2d Cir.1975)); *see also Europcar,* 156 F.3d at 315;*Industrial Risk Ins. v. M.A.N. Gutehoffnungshutte GmbH,* 141 F.3d 1434, 1445 (11th Cir.1998); *Parsons & Whittemore Overseas, Co., Inc. v. Societe Generale de L'Industrie du Papier (RAKTA),* 508 F.2d 969, 974 (2d Cir.1974). The award must violate an "explicit public policy that is well-defined and dominant ... [and is] ascertained by reference to the laws and legal precedents and not from general consideration of supposed public interests." *Industrial Risk Ins.,* 141 F.3d at 1445 (quoting *Drummond Coal Co. v. United Mine Workers, Dist. 20,* 748 F.2d 1495, 1499 (11th Cir.1984) (internal quotes deleted)).

1. Does The Lost Profits Award Constitutes An "Abuse of Rights"?

The international "abuse of rights" doctrine put forth by Pertamina in its defense of enforcement of the Final Award is akin to America's "good faith" principle of law. Joseph M. Perillo, "*Abuse of Rights: A Pervasive Legal Concept,*" 27 PAC. L.J. 37, (Fall 1995). Actions constitute an abuse within the scope of the doctrine if: "(1) the predominant motive for the action is to cause harm; or (2) the exercise of a right is totally unreasonable given the lack of any legitimate interest in the exercise of the right and its exercise harms another; or (3) the right is exercised for a purpose other than that for which it exists." JOHN D. CALAMARI AND JOSEPH M. PERILLO, THE LAW OF CONTRACTS, § 11.39 (4th 1998).

In asserting the "abuse of rights" doctrine, Pertamina does not argue that lost profits are never

a legitimate form of damages for breach of contract, but that an award of lost profits in this particular case, when KBC never finished construction on the Project and the Indonesian economy was in ruins, constitutes an abuse of rights in violation of United States public policy.

First, Pertamina falls far short of meeting its burden to show that the "abuse of rights" doctrine is well-defined and dominant in United States law. Pertamina has not cited a single case holding that "abuse of rights" is a recognized doctrine in the United States or applying that doctrine to avoid enforcement of a contractual right. However, even assuming for purposes of the instant motion that "abuse of rights" is an accepted legal doctrine in this country, the facts of this case, as found by the Tribunal, do not meet the elements of an "abuse of rights" as set forth by the authority relied upon by Pertamina. There is no evidence, and thus can be no finding, that KBC's primary motivation was to cause harm to Pertamina or the Indonesian People; that KBC lacks a legitimate interest in asserting its right to lost profits by virtue of its contracts with Pertamina; or that KBC was attempting to exercise its right to recover lost profits for any purpose other than being compensated for its losses caused by Pertamina's failure to perform its obligations under the contracts. The fact that KBC was awarded a substantial sum of money, and Pertamina may think that its resources are better spent elsewhere, does not satisfy the doctrine.

In arguing that the lost profits award constitutes an "abuse of rights," Pertamina cites two arbitration

awards that resulted from the same Presidential Decree that precipitated the arbitration in the instant case. *See* Petitioner's Legal Authorities ("LA") 2, Final Award dated May 4, 1999, *Himpurna California Energy Ltd. v. PT. (Persero) Perusahaan Listruik Negara* ("*Himpurna* "); LA 3, Final Award dated June 11, 1998, *Patuha Power Ltd. v. PT. (Persero) Perusahaan Listruik Negara* ("*Patuha*"). The arbitral tribunal that decided both *Himpurna* and *Patuha* invoked the doctrine of "abuse of rights" to deny the claimants' awards of lost profits. These awards contain extensive discussion of the "abuse of rights" doctrine. *See* Pertamina's Response, at 60-64. A review of those awards reveals that the tribunal was influenced by PLN's status as "an arm of governmental policy acting in pursuit of the public welfare" that had not intentionally deprived the claimant of valuable contractual rights, and by the dire straits of the Indonesian economy.[17]

The *Himpurna* and *Patuha* Final Awards were introduced into evidence by KBC, over Pertamina's objection.[18] Pertamina contends that despite its

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[17] It is noted that Pertamina's argument to this Court, that the interests of the Indonesian public demand that Pertamina be immune from liability for lost profits, is at odds with the vigorously defended position in the arbitration that Pertamina and PLN are not the alter-egos of the Indonesian Government. In any event, it is possible that the results in *Himpurna* and *Patuha* are attributable, at least in part, to positions taken by PLN in those cases that are materially different from PLN's positions here.

[18] Pertamina's reliance on *Himpurna* and *Patuha* is also somewhat disingenuous given its argument to the Tribunal that those decisions should not be treated as precedents. PX 71, Final Award, ¶ 31.

objection to those awards, it argued for application of the "abuse of rights" doctrine detailed therein, but the Tribunal ignored the doctrine. *See* Pertamina's Response, at 60. Pertamina's arguments fail for several reasons. First, prior arbitral awards are not precedential authority for the Tribunal or this Court. *See Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141, 147 (4th Cir.1993).

Second, it is clear that the doctrine of "abuse of rights" was before the Tribunal, and was not "ignored."[19] The Final Award indicates that the Tribunal in reaching its conclusion considered the state of the Indonesian economy and balanced the harm to Pertamina and PLN against KBC's legitimate interest in enforcing its contractual rights. The Tribunal noted that "the worsening of the economic and political situation in Indonesia at the time has to be taken into account as regards both the conditions at which financing could have been obtained and possible delays in arranging the same." PX 71, Final Award, ¶ 133. The Tribunal further noted, "[t]here is no doubt ... that the Claimant is entitled to obtain the benefit of its bargain in

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[19] In any event, it is likely that disregard of a principle of law is not a valid basis for avoiding confirmation under the Convention. *See M & C Corp.*, 87 F.3d at 851 n. 2 ("Whatever may be meant by the manifest disregard doctrine applicable in domestic arbitration cases, it is clear that such a doctrine does not rise to the level of a violation of public policy that is necessary to deny confirmation of a foreign arbitral award."); *RAKTA*, 508 F.2d at 977 ("Both the legislative history of Art. V and the statute enacted to implement the United States' accession to the Convention, are strong authority for treating as exclusive the bases set forth in the convention for vacating an award.").

addition to recovering the expenditures it has incurred. As stated in the *Himpurna* award, '[t]o limit the recovery of the victim of a breach to its actual expenditures is to transform it into a lender, which is commercially intolerable when the party was at full risk for the amount of investments made on the strength of the contract.' " *Id.*, ¶ 122. Thus, by awarding KBC its lost profits, the Tribunal necessarily rejected the "abuse of rights" doctrine in light of the facts and arguments presented.

This Court sees no reason to revisit the merits of the Tribunal's factual findings or its Final Award in this regard. The Court concludes that Pertamina has not met its burden to establish that the award to KBC of lost profits violates public policy.

2. Does the Final Award Hold Pertamina Liable For "Obeying The Law"

Pertamina lastly contends that the Tribunal held it liable for refusing to violate governing Indonesian law. As discussed *supra* in Section IV.B.2, at 953 - 54, this contention mischaracterizes the Final Award. The Tribunal did not find Pertamina liable for refusing to break the law.[20] Rather, in the Final Award, consistent with the Preliminary Award, the Tribunal found that Pertamina had a contractual responsibility to make KBC whole for a "Government [R]elated Event." The Tribunal thus found Pertamina liable for damages based on the parties'

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[20] Nor did the Tribunal hold that the Presidential Decree constituted a breach of contract by Pertamina, as Pertamina has argued elsewhere.

express contractual allocation of the risk of loss. As the Tribunal pointed out, the risk of loss was rational based on Pertamina's close relationship with the Indonesian Government.

Pertamina accordingly has not satisfied its burden to show that the Final Award offends the "most basic notions of morality and justice." Enforcement of the Final Award is not contrary to United States public policy.

V. *CONCLUSION AND ORDER*

Pertamina did not waive its right to assert the defenses established by the New York Convention in this case, but has failed to meet its burden of proof on any of its asserted defenses under the New York Convention. The Court finds that the arbitration was not contrary to the contractual agreements of the parties; Pertamina was not denied due process in connection with the arbitration proceeding; and the Final Award does not violate United States public policy. In addition, the Court concludes that Pertamina's request to be allowed to conduct discovery in this enforcement proceeding is without merit. It is therefore

ORDERED that KBC's Motion for Summary Judgment Confirming Arbitral Award [Doc. # 14] is **GRANTED.**

The Court will issue a separate Final Judgment.

In accordance with the Memorandum and Order issued this date, it is hereby

ORDERED that Petitioner Karaha Bodas Company, L.L.C.'s ("KBC's") Motion for Summary Judgment is **GRANTED.** It is further

ORDERED that the Final Award in the Arbitration dated December 18, 2000 is **CONFIRMED.** Therefore, in accordance with the Final Award, KBC shall recover from Pertamina:

> (1) $111,100,000.00 for lost expenditures, plus interest at the rate of 4% per annum from January 1, 2001 until the date of full payment;
> (2) $150,000,000 for lost profits, plus interest at the rate of 4% per annum from January 1, 2001 until the date of full payment;
> (3) $66,654.92 for costs and expenses of the arbitration, plus interest at the rate of 4% per annum from January 1, 2001 until full payment.

Each party shall pay its own costs incurred in this proceeding.

APPENDIX I

THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, JUNE 10, 1958

21 U.S.T. 2517, 330 U.N.T.S. 3
(codified at 9 U.S.C. §§ 201-208)

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

CONSIDERING THAT:

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards was adopted at New York on June 10, 1958, the text of which is as follows:

UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

ARTICLE I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral

awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

ARTICLE II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

ARTICLE III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

ARTICLE IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

ARTICLE V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that,

if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

ARTICLE VI

If an application for the setting aside or suspension

of the award has been made to a competent authority referred to in article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

ARTICLE VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

ARTICLE VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the

International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

ARTICLE IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

ARTICLE X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this

Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

ARTICLE XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a

statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

ARTICLE XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceeding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

ARTICLE XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

ARTICLE XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

ARTICLE XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(a) Signatures and ratifications in accordance with article VIII;

(b) Accessions in accordance with article IX;

(c) Declarations and notifications under articles I, X and XI;

(d) The date upon which this Convention enters into force in accordance with article XII;

(e) Denunciations and notifications in accordance with article XIII.

ARTICLE XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

APPENDIX J

28 U.S.C. § 1367

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

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SUPREME COURT, U.S.

(2)

No. 07-619

IN THE

Supreme Court of the United States

PT PERTAMINA (PERSERO), f/k/a PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA,

Petitioner,

v.

KARAHA BODAS COMPANY, L.L.C.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

CHRISTOPHER F. DUGAN
Counsel of Record
MATTHEW F. STOWE
JAMES E. BERGER
KAYCEE M. SULLIVAN
PAUL, HASTINGS, JANOFSKY & WALKER LLP
875 15th Street, N.W.
Washington, D.C. 20005
(202) 551-1700

Attorneys for Respondent

QUESTIONS PRESENTED

1. Whether an anti-suit injunction, upheld by the United States Court of Appeals for the Second Circuit using the most restrictive standard available, was justified under that approach.

2. Whether a litigant who obstructs the important public policies of prompt enforcement of international arbitration awards and finality of litigation may be enjoined from continuing to do so.

3. Whether a federal district court has continuing "ancillary" subject matter jurisdiction to protect and effectuate its own and other federal courts' judgments.

STATEMENT PURSUANT TO RULE 29.6

Respondent Karaha Bodas Company, L.L.C. certifies that its ultimate corporate parents are FPL Group, Inc., Caithness Energy, L.L.C., and P.T. Sumarah Dayasakti. Ten percent or more of the stock of Karaha Bodas Company, L.L.C. is indirectly owned by FPL Group, Inc., a publicly held company traded on the New York Stock Exchange.

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INTRODUCTION

Respondent Karaha Bodas Company, L.L.C. ("KBC") respectfully submits this brief in opposition to the Petition for a Writ of Certiorari (the "Petition") filed on November 8, 2007, by Petitioner PT Pertamina (Persero) (f/k/a Perusahaan Pertambangan Minyak Dan Gas Bumi Negara) ("Pertamina"). For all the reasons that follow, KBC respectfully submits that the decision of the United States Court of Appeals for the Second Circuit was correct in all respects, that there are no compelling reasons justifying a grant of certiorari by this Court, and that the Petition should be denied in its entirety.

COUNTER-STATEMENT OF THE CASE

Pertamina's three prior attempts to bring this straightforward commercial dispute before this Court have all been rejected.[1] This fourth Petition for

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[1] *See Perusahaan Pertambangan Minyak Dan Gas Bumi Negara v. Karaha Bodas Co., L.L.C.*, 539 U.S. 904, 123 S. Ct. 2256, 156 L. Ed. 2d 113 (2003) (denying Pertamina's petition for writ of certiorari to the U.S. Court of Appeals for the Second Circuit); *PT Pertamina (Persero) v. Karaha Bodas Co., L.L.C.*, 543 U.S. 917, 125 S. Ct. 59, 160 L. Ed. 2d 202 (2004) (denying Pertamina's petition for writ of certiorari to the U.S. Court of Appeals for the Fifth Circuit); *PT Pertamina (Persero) v. Karaha Bodas Co., L.L.C.*, 127 S. Ct. 129, 166 L. Ed. 2d 35 (2006) (denying Pertamina's petition for writ of certiorari to the U.S. Court of Appeals for the Second Circuit). On February 14, 2007, this Court also denied Pertamina's emergency application requesting a stay of the disbursement injunction lifted

(continued...)

certiorari concerns Pertamina's improper attempt to use the courts of the Cayman Islands to nullify the arbitration award issued to KBC in 2000, as well as the final judgments of the United States District Court for the Southern District of Texas (the "Texas District Court") and the United States Court of Appeals for the Fifth Circuit (the "Fifth Circuit") confirming the award, and the final judgments of the United States District Court for the Southern District of New York (the "New York District Court") and the United States Court of Appeals for the Second Circuit (the "Second Circuit") enforcing that award.

On December 18, 2000, a Swiss Arbitral Tribunal issued its final decision awarding KBC $261,166,654.92 (the "Award"). Pertamina refused to pay the Award, forcing KBC to commence confirmation and enforcement proceedings in the United States and abroad.[2] On December 4, 2001, the Texas District

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(...continued)

the previous day by the U.S. Court of Appeals for the Second Circuit.

[2] Pertamina's Petition states repeatedly that the Texas District Court's Judgment on the Award was "paid." It is important to note that Pertamina never voluntarily "paid" the award or resulting judgments. To the contrary, those judgments were satisfied only by virtue of the New York District Court's orders mandating a third party garnishee – Bank of America, which handles Pertamina's oil and gas revenues – pay the judgment funds to KBC. These orders were preceded by years of contentious litigation and resistance by both Pertamina and the Indonesian Ministry of Finance.

Court confirmed the Award and entered judgment in favor of KBC (the "Texas Judgment"). On October 22, 2004, the New York District Court issued a final judgment turning over to KBC the full amount of the Texas Judgment. The Second Circuit summarily affirmed the New York District Court's October 2004 judgment in March 2006. On September 15, 2006, just days before this Court denied Pertamina's third petition for certiorari – a decision that would have resulted in the final distribution of the funds to KBC and that should have ended this litigation[3] – Pertamina brought an entirely new lawsuit against KBC in the Cayman Islands (the "Cayman Action"). The Cayman Action sought, on the basis of a belated and meritless claim for "fraud," (a) to "vitiate" the Award that the Texas District Court confirmed and that the New York District Court enforced, and (b) to enjoin KBC from using the Texas Judgment funds or distributing them to its stakeholders. The New York District Court properly viewed Pertamina's tactics as a direct threat to its jurisdiction and prior judgments (as well as to the finality of the Award and the Texas Judgment, which was registered in the New York District Court pursuant to 28 U.S.C. § 1963 at the outset of the enforcement proceedings). Consequently, on December 19, 2006, the New York District Court issued an order

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[3] The New York District Court's turnover order was stayed pending adjudication of all appeals, so that no funds were actually turned over to KBC until this Court had denied Pertamina's and the Indonesian Government's respective petitions for certiorari in October 2006.

enjoining Pertamina from prosecuting the Cayman Action and from commencing new litigation in order to frustrate KBC's use of the Award proceeds and trap KBC in perpetual litigation. Importantly, the order also expressly protected Pertamina's right to freely litigate its "fraud" defense in those courts that were already involved in this matter. That anti-suit injunction was upheld, with modifications, by the Second Circuit. The modified order of the Second Circuit was correct in enjoining Pertamina from continuing its perpetual litigation and should be left undisturbed.[4]

COUNTER-STATEMENT OF THE FACTS

Pertamina's intransigence has caused this straightforward case to take on a long and complicated procedural history. The anti-suit injunction on appeal represents the culmination of over nine years of

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[4] Recent events illustrate that Pertamina has no intention of discontinuing its campaign to "vitiate" the judgment against it. On November 6, 2007 – two days prior to filing this fourth petition for certiorari in this matter – Pertamina's chief executive officer, Ari Seomamo, stated that Pertamina "*will fight to the end, we will fight until the last drop of our blood.*" *See* "Pertamina to Appeal Karaha Case in U.S. Court – Officials" Reuters, Nov. 6, 2007 (emphasis added) (Resp't App. 2a). This approach characterizes Pertamina's litigation conduct around the world, prolonging a straightforward commercial dispute into a nine-year procedural battle conducted in seven different countries. Courts around the world have uniformly condemned Pertamina's litigation misconduct. *See* Declaration of James E. Berger, Dec. 10, 2007 (Resp't App. 4a) (quoting myriad judicial rebukes).

arbitration and litigation in the United States and six other nations.

I. THE PRIOR PROCEEDINGS

A. The Project and the Arbitration

In 1994, KBC agreed with Pertamina to develop the Karaha Bodas geothermal energy project (the "Project") in West Java, Indonesia. On January 10, 1998, the President of Indonesia issued a decree that effectively terminated the Project. The Project's premature termination caused KBC to suffer substantial losses, and KBC accordingly initiated arbitration seeking damages of over $600 million for its lost investment and lost profits. *See Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 465 F. Supp. 2d 283, 285 (S.D.N.Y. 2006), *aff'd as modified by* 500 F.3d 111 (2d Cir. 2007). One of the most closely-contested issues during the arbitration was the size of the geothermal resource that KBC sought to develop. Pertamina argued that the geothermal yield of the Project was much lower than KBC claimed, and Pertamina cross-examined KBC's witnesses and questioned the geothermal analyses KBC had prepared. Most notably, Pertamina expressly alleged that the principal documents prepared by KBC describing the size of the geothermal resource were "sham[s]."[5] The Arbitral Tribunal considered and

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[5] Pertamina claims in its Petition that it "did not assert [in the Texas District Court proceedings] (because it did not then have (continued...)

rejected Pertamina's fraud allegations,[6] but agreed that the size of the resource may have been overestimated. *See Karaha Bodas Co.*, 500 F.3d at 113-14. Thus, while the Tribunal found that KBC's geothermal projections were genuine, it nonetheless ruled largely in Pertamina's favor on the issue of the size of the resources and reduced the amount of KBC's lost profits recovery by $350 million. *See id.* On December 18, 2000, the Arbitral Tribunal issued its final decision awarding KBC $261.1 million. *See Karaha Bodas Co.*, 465 F. Supp. 2d at 284.

B. The Confirmation and Annulment Proceedings

Pertamina has at all times adamantly refused to pay the Award, forcing KBC to commence confirmation and

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(...continued)

proof) that KBC's Notices had fraudulently misrepresented the extent of geothermal resource that KBC had confirmed." Petr. Brief at 6. That claim is demonstrably false. By its own admission, Pertamina had the documents it now touts as "proof" of KBC's alleged fraud at the time it moved in the Texas District Court for relief from the Texas Judgment under Fed.R.Civ.P. 60(b).

[6] The Second Circuit expressly found that Pertamina's fraud allegations were litigated before the Arbitral Tribunal and taken into consideration in determining the amount of the Award. *See Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 113-14 (2d Cir. 2007) ("The Swiss arbitral tribunal rejected Pertamina's allegations 'about the genuineness' of the information provided by KBC in support of its claims, but acknowledged the possibility that KBC's projections may have been 'overestimate[s].'")

enforcement proceedings in the United States, Hong Kong, Singapore, and Canada. The courts of each of those nations have confirmed the Award. In the United States, the Texas District Court confirmed the Award and entered judgment on December 4, 2001. The Texas Judgment was affirmed by the Fifth Circuit, whose order affirming the Texas Judgment this Court declined to review.[7] In addition to vigorously opposing KBC's attempts to confirm the Award, Pertamina commenced annulment actions in the courts of Switzerland and Indonesia. Following the Swiss Supreme Court's dismissal of Pertamina's first annulment petition, Pertamina commenced a second annulment action in the courts of Indonesia, which was ultimately dismissed.[8]

In response to Pertamina's Indonesian annulment action, KBC sought and was granted an anti-suit injunction by the Texas District Court to prevent Pertamina from prosecuting the annulment action.[9] On June 18, 2003, the Fifth Circuit vacated the Texas District Court's injunction on the ground that notions of international comity overrode any potential burdens

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[7] *See Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 190 F. Supp. 2d 936 (S.D. Tex. 2001), *aff 'd*, 364 F.3d 274 (5th Cir.), *cert. denied*, 543 U.S. 917 (2004).

[8] *See Karaha Bodas Co.*, 500 F.3d at 114-15.

[9] In March 2004, the Indonesian Supreme Court vacated the Indonesian trial court's order annulling the Award. *See Karaha Bodas Co.*, 500 F.3d at 115.

arising from the Indonesian litigation. *See Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* 335 F.3d 357, 375-76 (5th Cir. 2003). Despite finding that "Pertamina is likely in the wrong here, and that Indonesia's injunction and annulment may violate comity and the spirit of the [New York] Convention much more than would the district court's injunction," the Fifth Circuit held that because the Indonesian annulment action posed no threat to the Texas District Court's Judgment, international comity weighed in favor of allowing Pertamina to prosecute its Indonesian action.[10] *Id.* at 373. Despite finding in Pertamina's favor, the Fifth Circuit's decision was harshly critical of Pertamina, stating: "Although it is always possible for Pertamina to pursue enforcement . . . in third countries, it seems extremely unlikely that any country would countenance

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[10] While Pertamina alleges a circuit split arising in this same case based on the fact that the Fifth Circuit reversed the Texas District Court's earlier anti-suit injunction, the circumstances of that injunction are legally and factually distinct from those presently on appeal. The Fifth Circuit's decision expressly found that the Indonesian Court's annulment of the Award posed no threat to the Texas Judgment because U.S. courts had the discretionary authority to "ignore" the Indonesian decision and allow KBC to recover the Award. In contrast, the Cayman Action poses an unmistakable threat to the New York District Court's (and the Texas District Court's) jurisdiction because it seeks a Mareva injunction and damages in the precise amount of the Award, essentially annulling that award by restraining KBC's use of the very funds that the New York District Court ordered turned over to KBC to satisfy the Award.

such a claim, given Pertamina's dubious behavior throughout this process." *Id.* at 369. The Fifth Circuit further explained that Pertamina's pursuit of the Swiss annulment proceeding, its initial urging to the Texas District Court that Switzerland was the forum of primary jurisdiction, and its later abandonment of that position following the Swiss Supreme Court's dismissal of its annulment action were "*sufficient grounds to find Pertamina's behavior dubious and somewhat deceptive.*" *Id.* at 369 n.50 (emphasis added).

C. The Execution Proceedings

On February 22, 2002, KBC registered the Texas Judgment in the New York District Court pursuant to 28 U.S.C. § 1963.[11] On several occasions during the four years of execution proceedings that followed, the New York District Court found that Pertamina's litigation conduct was animated by a strategy of delay.[12] There

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[11] *See Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 77 (2d Cir. 2002), *cert. denied*, 539 U.S. 904 (2003).

[12] In a decision issued April 30, 2007, the New York District Court sanctioned Pertamina $500,000 for its bad-faith litigation conduct, finding that a Pertamina witness lied under oath in a deposition in an effort to frustrate the New York District Court from accurately ruling on the ownership of funds in New York bank accounts. *See Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, No. Civ. 21-MC-00098 (TPG), 2007 WL 1284903, at *6 (S.D.N.Y. April 30, 2007). The New York District Court invited KBC to make a further motion for sanctions covering Pertamina's misconduct that occurred after December 2004, when the original sanctions motion was filed. *See* Excerpt of

(continued...)

was never any doubt about Pertamina's intent: Pertamina's Finance Director, Alfred Rohimone, expressly stated in 2003 (when it was clear that payment of the Texas Judgment was likely unavoidable) that "what Pertamina is doing now is actually buying time. The objective is that KBC will be willing to negotiate so that the . . . claim can be reduced."[13]

II. THE CAYMAN ISLANDS LITIGATION AND THE ANTI-SUIT INJUNCTION

A. The Cayman Action

On September 15, 2006 – just two weeks before this Court denied Pertamina's third petition for certiorari[14] – Pertamina filed a lawsuit against KBC in the Cayman Islands (the "Cayman Action"). Pertamina's pleadings in the Cayman Action sought to "vitiate" the Award as a result of purportedly "newly discovered" documents that Pertamina alleged were evidence that KBC fraudulently overstated the size of the geothermal

(...continued)

Transcript of S.D.N.Y. Proceedings, Sept. 26, 2006, (Resp't App. 73a) ("[W]hat I am really looking for are lies, and there were some of those. And if that is repeated in this exercise there will be sanctions.") KBC filed an additional sanctions motion against Pertamina, but it has been stayed pending the outcome of this certiorari petition.

[13] *Karaha Bodas Co.*, 465 F. Supp. 2d at 289.

[14] *See PT Pertamina (Persero)*, 127 S. Ct. at 129, 166 L. Ed. 2d at 35.

resource of the Project.[15] In its Cayman Action, Pertamina sought, *inter alia*, (a) an injunction prohibiting KBC from prosecuting any actions to enforce the Award (including the then-ongoing litigation in the New York District Court), (b) "damages" equal to any sums received by KBC pursuant to the Award, and (c) a worldwide "Mareva" injunction freezing all of KBC's assets up to the amount of the Award, plus interest.[16]

Despite the fact that the Cayman Action sought damages in the exact amount of the Award, and despite its express demand to "vitiate" the Award, Pertamina has refused to acknowledge that its Cayman Action was an attempt to annul the Award. Instead, Pertamina contends that the Cayman Action is a separate and independent action, not one for annulment. *See Karaha Bodas Co.*, 500 F.3d at 122; *Karaha Bodas Co.*, 465 F. Supp. 2d at 290. To counter the obvious issues regarding the timing of its "fraud" claim, Pertamina has claimed repeatedly that the documents underlying the Cayman Action were "recently discovered." *See Karaha Bodas Co.*, 500 F.3d at 117. That claim is false. Pertamina admits that it received these documents in November 2002, but alleges that it never reviewed the documents until

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[15] As discussed *supra* in footnote 6, this is precisely the same issue that was litigated and decided during the arbitration.

[16] *See Karaha Bodas Co.*, 500 F.3d at 117; *Karaha Bodas Co.*, 465 F. Supp. 2d at 289.

August 2005. *See id.* The New York District Court considered the claim that these were "newly discovered" documents to be dubious indeed, stating that "the idea that this is newly discovered evidence is so suspect that I just affirmatively say it is simply probably not true . . . I think the probabilities are very, very strong that this is a flat misrepresentation."[17]

B. Pertamina's Concealment of the Cayman Action from the New York District Court

At a hearing on August 25, 2006, before the New York District Court regarding KBC's sanctions motion, KBC expressed concern that Pertamina was planning to initiate further litigation to hinder KBC's ability to receive the proceeds of the Texas Judgment. As a result, Judge Griesa asked Pertamina's counsel:

> [W]hat about that? Is there any intention to have further litigation, or can we end it? If the Supreme Court denies cert., will the money simply be paid to KBC or not?
>
> . . .

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[17] Sept. 26 Tr. S.D.N.Y. (Resp't App. 83a). Given Pertamina's acknowledgement that it has already spent over $20 million in legal fees in connection with its attempt to avoid paying the Award, it is simply not credible that these documents would have gone unreviewed for that long.

> The question is, and I have absolutely good reason for asking such a question in view of the record here, I want to know, assuming the Supreme Court denies cert., I want to know if Pertamina will now agree to the payment of the judgment, which would mean the release of the funds which are now held to secure that judgment, immediate release.
>
> . . .
>
> *[B]ecause even the possibility of further useless litigation is something that I want to be warned of,* and I want to know if it's in the offing, in view of this long record which you are aware of.

Excerpt of Transcript of S.D.N.Y. Proceedings, Aug. 25, 2006, (emphasis added) (Resp't App. 87a-89a). Pertamina's counsel claimed in response that he could not answer the question. *See id.* (Resp't App. 87a-88a). In a letter sent on August 28, 2006, Pertamina further evaded the New York District Court's questions, stating that "in the event that the Supreme Court denies the pending petitions, and assuming that the Court issues a turnover order with respect to the restrained funds appropriate in form and amount, Pertamina will not object before this Court to the

payment of the judgment."[18] Pertamina – which has never denied that it was planning the Cayman Action at the time – did not disclose the Cayman Action when it submitted its letter. Judge Griesa found that "of course, Pertamina knew. It deliberately concealed its plan from this Court and deliberately failed to have its attorney disclose that plan in the August 28 letter. No other conclusion is possible."[19] *Karaha Bodas Co.*, 465 F. Supp. 2d at 298. Given the subsequent filing of the Cayman Action, Judge Griesa properly found that Pertamina's letter constituted a "subterfuge" aimed at "deliberately conceal[ing]" its plan from the New York District Court. *See id.* at 298, 300.[20]

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[18] *See* Letter to Judge Griesa from Henry Weisburg, Aug. 28, 2006 (Resp't App. 91a).

[19] That was not the first time that Pertamina lied to the New York District Court about the Texas Judgment. On April 19, 2004, in response to KBC's demand that Pertamina produce a deposition witness, Pertamina's former counsel wrote to the New York District Court stating that Pertamina "commits to pay the Texas Judgment in the event that its forthcoming writ of certiorari concerning the Fifth Circuit's decision is denied or otherwise unsuccessful." Letter from M. Slater to Judge Griesa, Apr. 19, 2004 (Resp't App. 93a). Based on this "promise," Pertamina asked the New York District Court to stay any further enforcement proceedings. When the Supreme Court later denied Pertamina's petition for certiorari, Pertamina reneged on its promise to pay. *See* Excerpt of Transcript of S.D.N.Y. Proceedings, Oct. 5, 2004 (Resp't App. 97a) ("Your Honor . . . I regret that unfortunately I cannot effectuate that today and I cannot rely on the letter . . .").

[20] In hearing before the Second Circuit on May 21, 2007, Judge Cabranes questioned Pertamina's counsel regarding the deliberate concealment:

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C. The Anti-Suit Injunction

On September 21, 2006, KBC filed a motion for an injunction preventing Pertamina from prosecuting the Cayman Action.[21] The New York District Court

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> JUDGE CABRANES: *Why would anyone use this curious locution before this Court if it wasn't to try to be evasive with respect to something that would transpire later? . . .* I mean wouldn't the normally English language statement that if you intended to simply acquiesce to the district court's judgment and let the funds pass free and clear to KBC, you would have said something roughly like that. *You wouldn't have seized upon this clever locution "not object before this Court the payment of the judgment."*
>
> MR. SINGER: I don't know, Your Honor.
>
> JUDGE CABRANES: *. . . It certainly looks curious at a minimum, perhaps even apparent that Pertamina is trying to evade the jurisdiction of the district court and to effectively to be free to move this dispute to yet another forum.*

Excerpt of Unofficial Transcript of Second Circuit Proceedings, May 21, 2007 (emphasis added) (Resp't App. 105a-106a).

[21] KBC has no doubt that it would ultimately be successful in the Cayman Action, just as it was successful in Hong Kong on precisely the same "fraud" issues. *See* discussion *infra* at 17. However, the full relitigation of these issues would be extremely

(continued...)

conducted a hearing on the issue on September 26, 2006, and immediately issued a partial injunction barring Pertamina from taking any action in the Cayman Islands challenging the New York District Court's jurisdiction or seeking to encumber any funds that would be turned over by it. *See* Sept. 26 Tr. (Resp't App. 76a). On October 6, 2006, after this Court denied Pertamina's third petition for certiorari,[22] the New York District Court ordered the turnover[23] of approximately $260 million, the remaining unpaid amount of the Texas Judgment. On December 8, 2006, the New York District Court issued an opinion granting a full anti-suit injunction against Pertamina. *See Karaha Bodas Co.*, 465 F. Supp. 2d at 283. After finding that the "main objective of Pertamina is to have the Cayman Islands court reach out to the United States and frustrate the consummation of the long and difficult litigation in the United States," the decision enjoined Pertamina from seeking, through affirmative

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costly and time consuming. After prevailing in every tribunal around the world, KBC should not be forced to participate in perpetual litigation.

[22] *PT Pertamina (Persero)*, 127 S. Ct. at 129, 166 L. Ed. 2d at 35.

[23] Pertamina claims in its Petition that it "promptly complied" with the turnover orders. Petr. Brief at 10. That claim is utterly false: For almost eight years, Pertamina has refused to pay a single penny of the Award. Because of that recalcitrance, the turnover orders were directed not at Pertamina, but at the bank in New York that had frozen Pertamina's funds. *See Karaha Bodas Co.*, 465 F. Supp. 2d at 291.

litigation in the Cayman Islands or elsewhere, to restrain KBC's use of the Texas Judgment proceeds or to attempt to recoup those proceeds through affirmative litigation. *Id.* at 298-99. The Second Circuit upheld that decision, with modifications, clarifying that Pertamina's actions warranted an anti-suit injunction under the strict standard imposed by the *China Trade* test. It is this decision that Pertamina now appeals.[24]

D. The Hong Kong Action

Pertamina's "fraud" claim – the same claim that the Arbitral Tribunal decided in 2000 and that Pertamina sought to relitigate in the Cayman Action – was decisively rejected by the Court of Appeal in Hong Kong. The court there conducted a three-day hearing carefully considering the voluminous evidence and affidavits that the parties submitted. In a decision

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[24] On October 11, 2007, the Cayman Court issued an order dismissing Pertamina's claim, stating:

> I am satisfied that in all the circumstances the description by the New York Court of Pertamina's proceedings before this Court as *"an abusive litigation tactic" is entirely justified.* It is clear that the proceedings amount in the circumstances to an attempt to use this Court for a collateral purpose, [namely] an attempt to further delay and avoid the enforcement of the arbitral award made almost 7 years ago. *In my view that was improper and unreasonable [and as] such an abuse of this Court.*

Decision, Cause No. 386 of 2006, Grand Court of the Cayman Islands (Oct. 11, 2007) (emphasis added) (Resp't App. 113a).

issued October 9, 2007, the Hong Kong Court of Appeals found Pertamina's claim to be "*singularly lacking in merit.*"[25] In rejecting the fraud claims, the Hong Kong Court found that Pertamina had not even made out a *prima facie* case for fraud, let alone demonstrated a reasonable prospect of success on the merits:

> *[T]his plea did not achieve the level of a "prima facie case", much less the standard of a "reasonable prospect of success."*
>
> . . .
>
> I do not think Pertamina comes anywhere near to establishing that the new evidence would have an important influence on the outcome of the arbitration. *Further, I do not think they show any fraud practiced by KBC at the court below or for that matter, at the arbitration proceedings.*

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[25] Excerpts of Decision, Civil Appeal no. 121/2003, High Court of the Hong Kong Special Administrative Region Court of Appeal (Oct. 9, 2007), at ¶142 (emphasis added) (Resp't App. 119a).

Id. (Resp't App. 117a, 121a, ¶¶ 134, 154) (emphasis added). Despite losing yet again, in yet another forum, Pertamina filed this Petition for certiorari a month later, seeking to overturn the decision of the Second Circuit so that it can litigate its hopeless "fraud" allegations for a third time in the Cayman Action. If this injunction is lifted, Pertamina will no doubt seek to engage in perpetual litigation, fighting "to the last drop of [its] blood."

REASONS FOR DENYING THE PETITION

Pertamina's certiorari Petition should be denied because none of the three circuit splits it alleges is ripe for review by this Court on the facts of this case. The only deep split alleged in Pertamina's Petition – that the Courts of Appeals differ over the standards for granting international anti-suit injunctions – is not implicated by the facts of this case because the lower court applied the standard most favorable to Pertamina and still found that an anti-suit injunction was warranted. Pertamina attempts to avoid this result by re-characterizing a well-known and longstanding two-way split in the lower courts as a three-way split instead, with the Second Circuit test purportedly occupying the middle ground, but this position finds no support in the numerous appellate decisions that address the issue.

The remaining splits alleged by Pertamina implicate at most one other lower court opinion apiece. Properly read, there is no actual conflict posed by either of these two pairs of opinions, as the facts of the cases differed dramatically in important respects. Moreover, even if the conflicts Pertamina alleges were genuine, the lower courts should be given additional time to sort out these issues, so that additional decisions from the Courts of Appeals can provide this Court with the benefit of additional reasoning on the issues involved before they are permanently settled.

Finally, the decision below as it stands serves important public policy interests regarding the swift

enforcement of arbitration awards and the finality of litigation. Pertamina has vexatiously delayed this straightforward commercial dispute for almost a decade, attempting to use the specter of endless litigation to leverage a "settlement" in a case that was resolved on the merits in 2000. A grant of certiorari by this Court on any issue would serve primarily as a validation of these delaying tactics, which have been criticized by courts around the world.

III. THE SECOND CIRCUIT APPLIED THE STRICTEST STANDARD IN GRANTING AN ANTI-SUIT INJUNCTION UNDER THESE UNIQUE CIRCUMSTANCES, AND CONSEQUENTLY PERTAMINA IS NOT ENTITLED TO RELIEF REGARDLESS OF THE STANDARD USED TO GRANT SUCH INJUNCTIONS.

Although it is generally correct that there is a longstanding split among the Courts of Appeals over the standard for issuing a foreign anti-suit injunction, that split is not implicated by the decision below. The Second Circuit is among those courts that apply the most restrictive test, and consequently Pertamina would not be entitled to relief regardless of which test this Court might adopt as a nationwide rule. Pertamina has attempted to avoid this result by re-casting the well-known and longstanding two-way split over the standards for granting international anti-suit injunctions into a three-way split instead. Then, Pertamina attempts to place the Second Circuit among

its newly-invented "middle group" in order to make it appear that a decision in favor of the most restrictive test would allow Pertamina to return to the Second Circuit in an attempt to obtain relief under a more restrictive anti-suit injunction standard. Pertamina's re-casting of the split finds no support in the decisions of the Courts of Appeals, which have consistently noted the existence of a two-way split and have placed the Second Circuit firmly on the most restrictive side. Consequently, this case is not a proper vehicle for this Court to use to settle the split over anti-suit injunction standards.

The standard used by the Second Circuit was first established more than twenty years ago and has consistently been recognized as the most restrictive standard. The Second Circuit's *China Trade* test for issuing an anti-suit injunction has two threshold requirements: "(1) the parties must be the same in both matters, and (2) resolution of the case before the enjoining court must be dispositive of the action to be enjoined." *China Trade and Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 35 (2d Cir. 1987). If these two threshold requirements are satisfied, courts may consider other relevant factors in deciding whether to grant the injunction. *Paramedics Electromedicina Comercial, Ltda, v. GE Medical Sys. Info. Tech., Inc.*, 369 F.3d 645, 652 (2d Cir. 2004). Of these, two factors have "greater significance" than the others: "namely, whether the foreign action threatens the jurisdiction or the strong public policies of the enjoining forum." *Karaha Bodas Co.*, 500 F.3d at 126 (citing *China Trade*,

837 F.2d at 36). The Second Circuit properly weighed these factors when it upheld the anti-suit injunction issued by the New York District Court.

As courts across the nation have observed, the *China Trade* test places the Second Circuit firmly among the most conservative circuits in terms of the test it applies in determining whether and when anti-suit injunctions may issue. The Second Circuit originally adopted this extremely restrictive test precisely because it recognized and placed a high value on concerns over the damage such injunctions can do to international relations. *See Paramedics*, 369 F.3d at 652 ("[P]rinciples of comity counsel that injunctions restraining foreign litigation be 'used sparingly' and 'granted only with care and great restraint.'") (quoting *China Trade*, 837 F.2d at 36). The decision by the Second Circuit in this case is completely in accord with the important principles of comity it espoused.

The Courts of Appeals have repeatedly and recently recognized the existence of a two-way split over the standards for issuing anti-suit injunctions, and placed the Second Circuit on the conservative side of this binary split. As the First Circuit explained as recently as 2004, "[t]wo basic views have emerged. For ease in reference, we shall call the more permissive of these views the liberal approach and the more restrictive of them the conservative approach." *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 17 (1st Cir. 2004) (citing Note, *Antisuit Injunctions and International Comity*, 71 VA. L. REV. 1039, 1049-51

(1985)). The First Circuit went on to observe that the Fifth and Ninth Circuits have adopted a liberal approach, with the Seventh Circuit expressing support for this approach in dicta. *See id.* at 17. Under the liberal approach, courts give international comity some consideration, but tend to define comity interests narrowly and give comity concerns modest weight. *See id.* In practice, an international anti-suit injunction may issue in these more permissive circuits "whenever there is a duplication of parties and issues and the court determines that the prosecution of simultaneous proceedings would frustrate speedy and efficient determination of the case." *Id.* (citing *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 627 (5th Cir. 1996), *cert. denied*, 519 U.S. 821 (1996); *Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League*, 652 F.2d 852, 856 (9th Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982)).

Rejecting this approach, the First Circuit expressly placed itself within the "conservative" camp, which "[f]our courts of appeals have espoused." *Id.* "Under this approach, the critical questions anent the issuance of an international antisuit injunction are whether the foreign action either imperils the jurisdiction of the forum court or threatens some strong national policy." *Id.* (citing *Stonington Partners, Inc. v. Lernout & Hauspie Speech Products.*, 310 F.3d 118, 127 (3d Cir. 2002); *China Trade*, 837 F.2d at 36). The First Circuit explained that the conservative approach used by the Second, Third, Sixth, and D.C. Circuits imposes a presumption against international anti-suit injunctions, "is more respectful of principles of international

comity," and recognizes that issuing an anti-suit injunction is a step that should be taken only with the utmost care and restraint. *Quaak* at 18. Nowhere in its opinion does the First Circuit note any tension with its decision and earlier decisions of the Third, Sixth, and Eighth Circuits, as Pertamina alleges exists. *See* Petr. Brief at 31. There is no language suggesting, as Pertamina does, that the First Circuit was imposing a different test than those circuits, *see* Petr. Brief at 32-34, a test that would permit consideration of various "equitable factors" in situations where the Third, Sixth, and Eighth Circuits would not.

Nor does Pertamina's characterization of a three-way split find support in earlier circuit decisions. In 2001, the Third Circuit also characterized the foreign anti-suit injunction split as binary. "The federal Courts of Appeals have not established a uniform rule for determining when injunctions on foreign litigation are justified. Two standards, it appears, have developed." *Gen. Elec. Co. v. Deutz AG*, 270 F.3d 144, 160 (3d Cir. 2001). Just as the First Circuit would do a few years later, the Third Circuit described the Fifth, Seventh, and Ninth Circuits as generally applying the "liberal" standard, and explained that "the Second, Sixth, and District of Columbia Circuits use a more restrictive approach." *Id.* Again, the Third Circuit specifically cited the Second Circuit's decision in *China Trade* in support of its assertion, noting that these courts "approve enjoining foreign parallel proceedings only to protect jurisdiction or an important public policy. Vexatiousness and inconvenience to the parties carry

far less weight." *Id.* at 161. Consequently, while Pertamina asserts that the Third Circuit would not consider vexatiousness and inconvenience to the parties at all (labeling these factors "other equitable considerations"), *see* Petr. Brief at 33-34, the Third Circuit implied just the opposite when it decided that "[o]ur Court is among those that resort to the more restrictive standard." *Gen. Elec.*, 270 F.3d at 161. Pertamina's contention that some circuits would refuse to consider other equitable factors at all appears to be the result of purposefully misreading selected dicta from various opinions.

Indeed, the Second Circuit's *China Trade* test has been consistently placed on the conservative side of the binary circuit split going back at least fifteen years. The Sixth Circuit, in a decision joining the conservative courts, observed the existing split in 1992 as involving on one side "[t]he Ninth and Fifth Circuits [that] hold that a duplication of the parties and issues, alone, is generally sufficient to justify the issuance of an international injunction" and on the other "the Second and DC Circuits [that] have held the standard for granting a foreign anti-suit injunction is whether the injunction is necessary to protect the forum court's jurisdiction or to prevent evasion of the forum court's important public policies." *Gau Shan Co. Ltd. v. Bankers Trust Co.*, 956 F.2d 1349, 1353 (6th Cir. 1992). Again, the Sixth Circuit specifically cited the Second Circuit's *China Trade* decision in support of the conservative position it adopted. *See id.* Numerous courts in between *Gau Shan* and *Quaak* have also

characterized the split as binary and placed the Second Circuit on the most restrictive side. *See, e.g., Stonington Partners*, 310 F. 3d at 126-27; *Kaepa*, 76 F.3d at 627 n.12; *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425, 431-32 (7th Cir. 1993). If, as Pertamina asserts, there is a third side to the split between courts that will consider other equitable factors and those that will not, it is curious that none of these courts has noticed and commented on it.

This Court should accept the lower courts' uniform characterization of this split as a binary one, and recognize, as each circuit has, that the Second Circuit's test embraces the most conservative standard. Because the Second Circuit issued an anti-suit injunction against Pertamina using the most restrictive standard, which was the most favorable to Pertamina, Pertamina would not be entitled to any relief even if this Court granted certiorari and ruled in its favor on the choice of standards. Consequently, the existing split among the Courts of Appeals on anti-suit injunction standards is simply not implicated by the facts of this case, and the Petition should be denied for that reason alone.

IV. ANY GRANT OF CERTIORARI IN THIS CASE WOULD THWART IMPORTANT PUBLIC POLICY AND EQUITABLE CONSIDERATIONS BY VALIDATING PERTAMINA'S HIGHLY QUESTIONABLE DELAYING TACTICS IN THIS CASE, WHICH HAVE BEEN THE SOURCE OF CONSTERNATION TO COURTS AROUND THE WORLD.

Leaving the decision below intact serves important public policy considerations that would be undermined by any grant of certiorari by this Court, even if this Court ultimately affirmed the opinion below or otherwise ruled in favor of KBC. Pertamina's attempt to pursue the Cayman Action violated the public policies of: (1) the finality of litigation, (2) respect for arbitration clauses, (3) respect for arbitral awards, especially in the international arena, and (4) the discouragement of forum shopping and vexatious conduct. The injunction was intended to stop Pertamina from engaging in perpetual litigation around the world to thwart an arbitration award that it should have paid almost a decade ago. Any action by this Court vacating the injunction or calling its validity into question even temporarily would effectively validate Pertamina's delaying tactics and encourage other parties to engage in similarly dubious legal behavior.

A. Federal policy favors finality of litigation.

Federal law embodies a strong policy favoring finality of litigation. *See Rubin v. Mfrs. Hanover Trust Co.*, 661 F.2d 979, 996 (2d Cir. 1981) ("[S]trong policies favoring finality in litigation and conservation of judicial resources lead an appellate court to disregard contentions that a party has not asserted at trial or has failed to raise on appeal."). Pertamina's commencement of the Cayman Action on the eve of this Court's final ruling – and its concealment of that intention from the New York District Court – demonstrate an obvious contempt for this fundamental policy. Pertamina waited until more than eight years of arbitration and litigation in this case had transpired before bringing its Cayman Action. As the New York District Court expressly found,[26] if Pertamina actually believed it had been "defrauded" by KBC, it could have raised its claim much earlier by interposing it, at a minimum, in either the New York District Court or the Texas District Court proceedings.[27] Rather than utilize these options,

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[26] *Karaha Bodas Co.*, 465 F. Supp. 2d at 297.

[27] Pertamina seemingly misunderstands the New York District Court's discussion of Pertamina's missed opportunity to address its claims through Rule 60(b). It is correct that Rule 60(b) is not, in and of itself, a public policy. However, it is a rule that *embodies* important national policies, seeking to reconcile "a tension between two goals: (1) that of ensuring that the court's judgment reflect[s] an appropriate adjudication of the rights and obligations of the parties, and (2) *that of finally terminating the litigation in order to provide the parties with certainty as to the nature and extent of their rights and obligations as adjudicated.*" *In re*

(continued...)

Pertamina chose instead to withhold and delay its claim until the last possible minute, going so far as to actively conceal and misrepresent its intentions to the New York District Court. Given the overwhelming evidence of Pertamina's intent to delay and the ample opportunities it had to assert its fraud claim previously, there can be little doubt that Pertamina's litigation conduct was inimical to the strong federal policy favoring finality in litigation, and that the anti-suit injunction was necessary to properly vindicate that policy.

B. Federal policy favors enforcement of arbitration clauses.

"Federal policy strongly favors enforcement of arbitration agreements." *See Paramedics*, 369 F.3d at 653 (citing 9 U.S.C. § 2; *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)). The claim in the Cayman Action that KBC defrauded Pertamina during the performance of the underlying contract (the "direct fraud" claim) is, by the plain terms of the arbitration agreement between Pertamina and KBC, subject to mandatory arbitration. *See Karaha Bodas Co.*, 364 F.3d 274, 282 (5th Cir. 2004). Instead of abiding by its agreement to arbitrate, Pertamina ignored it altogether when it commenced the Cayman Islands action. The anti-suit injunction was

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(...continued)

Frigitemp Corp., 781 F.2d 324, 326-27 (2d Cir. 1986) (emphasis added).

consequently necessary to effectuate the important federal policy in favor of the enforcement of arbitration agreements.

C. Federal policy demands that arbitration awards be enforced swiftly and efficiently.

Leaving the anti-suit injunction undisturbed is also justified by the strong public policy favoring respect for arbitration awards. *See, e.g., B.L. Harbert Int'l, L.L.C. v. Hercules Steel Co.*, 441 F.3d 905, 913 (11th Cir. 2006) ("When a party who loses an arbitration award assumes a never-say-die attitude and drags the dispute through the court system without an objectively reasonable belief it will prevail, the promise of arbitration is broken."). This Court has commented frequently on the desirability of encouraging the use of arbitration as a means of dispute resolution in cases both national and international. More than twenty years ago this Court explained "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Mitsubishi Motors Corp. v. Solar Chrystler-Plymouth Inc.*, 473 U.S. 614, 626-27 (1985).

Instead, in today's world this Court has commented that effective international arbitration is:

> [An] almost indispensable precondition to achievement of the orderliness and

> predictability essential to any international business transaction. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.

Scherk v. Alberto-Culver Co., 417 U.S. 506, 516 (1974). This Court has further explained the danger that "[a] parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages." *Id.* at 516-17. This Court has even gone so far as to criticize lower courts for issuing stays that interfere with the rapid enforcement of arbitral awards, explaining that they "frustrate[] the [federal] statutory policy of rapid and unobstructed enforcement of arbitration agreements." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 23.

Disturbing the decision below would contravene this important and oft-repeated guidance from this Court, and would send the wrong message to lower courts and parties tempted to resist arbitration. The Award in this case was issued seven years ago, yet duplicative litigation in several jurisdictions continues. As the Second Circuit observed in upholding the injunction:

> We have noted "the strong public policy in favor of international arbitration," and the need for proceedings under the New York Convention "to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation." *These important objectives would be undermined were we to permit Pertamina to proceed with protracted and expensive litigation that is intended to vitiate an international arbitral award that federal courts have confirmed and enforced.*

Karaha Bodas Co., 500 F.3d at 126 (citations omitted and emphasis added). This Court now has the opportunity to send the proper message regarding the desirability of swift and effective international arbitration by denying Pertamina's latest certiorari Petition.

D. Federal law does not countenance forum shopping or other vexatious conduct.

Finally, continuance of the anti-suit injunction is consistent with the strong federal policies prohibiting forum shopping. *See Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508-09 (2001) (interpreting rule to avoid resultant forum shopping); *Ibeto Petrochemical Indus. Ltd. v. M/T Beffen*, 475 F.3d 56, 64 (2d Cir. 2007) (explaining that "equitable considerations such as deterring forum shopping favor the [anti-suit] injunction"). Pertamina raised its fraud

allegations before the Arbitral Tribunal, which took those allegations into consideration when issuing its Award in 2000. Pertamina's subsequent arguments concerning the propriety of the Award have been rejected by courts in every country to consider them, including the courts of Indonesia. Although Pertamina could have raised its fraud allegations in most of these previous fora, it chose instead to file its claim alleging fraud in the Cayman Islands, a jurisdiction whose courts were unfamiliar with both the dispute and Pertamina's prior litigation tactics.

The Cayman Action was indisputably vexatious. After almost a decade of arbitration and litigation, Pertamina waited until two weeks before the funds were likely to be paid to KBC to bring a new action that sought, on its face, to strip the New York District Court of enforcement jurisdiction and enjoin KBC from using the Texas Judgment proceeds. Because Pertamina had been in possession of the documents that allegedly support its fraud claim[28] for at least four years when it filed the Cayman Action, this delay is inexcusable and impossible to consider as good faith litigation conduct. As the New York District Court noted, Pertamina had time to raise these "fraud" allegations before the Texas District Court in a "direct and straightforward" manner; instead, they chose to

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[28] As noted *supra* at 17, the Hong Kong Court of Appeals carefully considered and soundly rejected Pertamina's fraud allegations.

make these allegations in a forum that has "virtually no significance" to the dispute.[29]

V. FEDERAL COURTS HAVE CONTINUING JURISDICTION TO PROTECT AND EFFECTUATE THEIR JUDGMENTS.

Federal courts maintain continuing jurisdiction to protect their final judgments, even after satisfaction. This Court has long held that federal courts have the power and duty to ensure that litigants retain "the substantial fruits of a judgment rendered in their favor," and that federal courts have jurisdiction to protect a judgment "no matter how or when [a party] may attempt to evade it or escape its effect[.]" *Dietzsch v. Huidekoper*, 103 U.S. 494, 497 (1880); *Local Loan Co. v. Hunt*, 292 U.S. 234, 239 (1934) ("That a federal court of equity has jurisdiction of a bill ancillary to an original case or proceeding in the same court, whether at law or in equity, to secure and preserve the fruits and advantages of a judgment or decree rendered therein, is well settled."); *see also* 28 U.S.C. § 1367(a) (codifying doctrine of ancillary jurisdiction by providing that federal courts have jurisdiction over "all other claims that are so related to the claims in the action within [the court's] original jurisdiction that they form part of the same case or controversy under Article III"); All Writs Act, 28 U.S.C. § 1651(a) (providing that federal courts "may issue all writs necessary or appropriate in

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[29] *Karaha Bodas Co.*, 465 F. Supp. 2d at 297-98.

aid of their respective jurisdictions and agreeable to the usages and principles of law").

Pertamina has argued that the Second Circuit's opinion supporting these propositions is contrary to the decision reached by the Eighth Circuit in *Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355 (8th Cir. 2007). The instant Petition does not pose a good opportunity for this Court to review any putative shallow split in circuit authority because the facts of the two cases differ so dramatically, rendering it difficult if not impossible to accurately gauge whether a meaningful split yet exists between the circuits. The Eighth Circuit in *Goss*, while occasionally using more expansive dicta, carefully limited its holding to the unusual facts of that case. Moreover, its decision was based on various factors including (1) the direct threat posed to international bilateral relations by an injunction and (2) concerns regarding the constitutional balance of powers, neither of which is present in this case.

More specifically, the *Goss* case involved a judgment issued under the Antidumping Act of 1916, which Congress prospectively repealed as a result of a dispute before the World Trade Organization ("WTO"). *See id.* at 356-359. As the repeal was prospective, it did not affect the *Goss* judgment. *See id.* at 358. Because Japan considered that prospectivity to be contrary to the United States' obligations under the WTO agreements, it enacted a Special Measures Law, a

clawback statute that specifically allows Japanese entities to recover judgments awarded under the 1916 Act. *See id.* This was not a broad statute; in fact, the Special Measures Law affected only one judgment: the *Goss* decision. *See id.* at 366 ("[T]he only lawsuit possible under the Special Measures Law can be brought against Goss alone."). Given the direct and pointed conflict between the U.S. and Japanese legislatures regarding the validity of the *Goss* judgment, the *Goss* anti-suit injunction "would be deeply offensive to the Japanese government." *Goss v. Tokyo Kikai Seisakuscho, Ltd.*, 435 F. Supp. 2d. 919, 929 (N.D. Iowa 2006), *vacated*, 491 F.3d 355 (8th Cir. 2007).

It is clear that the instant case does not involve such a direct international conflict between two nations. The Eighth Circuit recognized the unique circumstances of the *Goss* case and expressly limited its opinion, finding that while the anti-suit injunction could not be maintained under those circumstances, "we reach no categorical conclusion regarding the propriety of the issuance of an anti-suit injunction in all cases involving the preservation of a judgment." *Goss*, 491 F.3d at 368 n.9. Moreover, the *Goss* Court did not cite to a single case that held that subject matter jurisdiction terminates when the judgment is paid. Instead, it cited *Peacock v. Thomas*, 516 U.S. 349 (1996), which stands only for the inverse proposition that "the district court retained ancillary enforcement jurisdiction *until* satisfaction of the judgment." *Goss*, 491 F.3d at 365 (emphasis in original). As noted by the *Goss* Court, this

Court explained in *Peacock* the importance of the maintenance of jurisdiction after issuance of the judgment: "Without jurisdiction to enforce a judgment entered by a federal court, 'the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution.'" *Peacock*, 516 U.S. at 356 (internal quotations omitted). Consequently, the rule, unchanged by the unique facts of the *Goss* case, is that federal courts maintain jurisdiction to protect a final judgment even after satisfaction. There is simply no circuit split on this issue implicated by the facts of this case.

CONCLUSION

For all the foregoing reasons, Pertamina's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

CHRISTOPHER F. DUGAN
Counsel of Record
MATTHEW F. STOWE
JAMES E. BERGER
KAYCEE M. SULLIVAN
PAUL, HASTINGS, JANOFSKY
& WALKER LLP
875 15th Street, N.W.
Washington, D.C. 20005
(202) 551-1700

Attorneys for Respondent

APPENDIX 1 — NEW RELEASES, REUTERS DATED NOVEMBER 6, 2007

REUTERS

Pertamina to appeal Karaha case in US court -officials

Tues Nov 6, 2007 3:16am EST

By Muklis Ali

JAKARTA, Nov 6 (Reuters) - Indonesian state oil firm Pertamina will appeal to the U.S. Supreme Court to try to recover some $300 million it was ordered to pay to Karaha Bodas to settle a dispute, Pertamina officials said.

Pertamina and U.S. firm Karaha agreed in 1994 to develop a geothermal energy project in Indonesia's West Java province, but the 1997-98 Asia financial crisis put an end to the plan and led to a prolonged legal battle.

Both parties finally reached a settlement earlier this year, when Karaha was paid more than $300 million.

But a Pertamina official, who declined to be named, said the money paid to Karaha came from a Ministry of Finance bank account, adding that Pertamina and the ministry were now fighting over who should bear the costs.

"$319 million has been paid to Karaha and that included interest. That was government money. Pertamina has been asked to pay back the money to the government," the official said.

Pertamina is now trying to recover the money from Karaha and has launched appeals in various jurisdictions including a New York district court, Hong Kong, and the Cayman Islands.

The company claims Karaha committed a fraud, according to court documents, but its suits have been rejected by the various courts.

"We have a number of steps we can take," Pertamina President Director Ari Seomarno said on Tuesday. "We will fight till the end, we will fight until the last drop of our blood."

Another Pertamina official, who asked not to be identified by name, said Pertamina would file an appeal with the U.S. Supreme Court.

"Pertamina thought there was a fraud by Karaha in the geothermal project," the official said.

Karaha, which spent $111 million on the geothermal project before it was halted, asked a Swiss arbitration panel in 1999 to force Pertamina to repay its lost investment and cover future profits.

The tribunal awarded Karaha, which is owned by Caithness Energy LLC and FPL Energy LLC, a subsidiary of FPL Group (FPL.N: Quote, Profile, Research), $261 million in 2000.

Last year, the U.S. Supreme Court turned down an appeal by Pertamina to overturn that award. The money, plus interest, was paid to Karaha earlier this year.

A New York court also recently ordered Pertamina to pay $500,000 to Karaha because a former Pertamina official had committed perjury in the case. (Editing by Sara Webb & Ian Geoghegan)

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DECLARATION OF JAMES E. BERGER

I, James E. Berger, declare as follows:

1. I am an attorney with the law firm of Paul, Hastings, Janofsky & Walker LLP, counsel for Respondent Karaha Bodas Company, L.L.C. ("KBC") in this matter. I offer this declaration in support of KBC's Brief in Opposition to Pertamina's Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit. I am a member in good standing of the bar of this Court.

2. I have personal knowledge of the matters set forth herein, and could and would testify competently thereto if called upon to do so.

3. As set forth herein, over the past six years, courts around the world have repeatedly criticized Pertamina's litigation misconduct in these proceedings.

2001

4. On July 13, 2001, the Honorable Nancy Atlas, of the U.S. District Court for the Southern District of Texas, convened a hearing on Pertamina's Motion for Stay Pending Resolution of Swiss Appeal. During that hearing, Judge Atlas made the following statements after learning that Pertamina had yet to pay a filing fee due to a Swiss Court:

> **[I]t is ironic how many times your client has failed to respond or waited until the last day to take action in the course of the preliminary proceedings and in the arbitration and then the appeal.**
>
> . . .
>
> I do not consider it pursuing your appeal or your efforts to appeal diligently when you wait until the last day to file.

Tr. of Proceedings before S.D. Tex., July 13, 2001, at 11:2-5, 12:22-24 (emphasis added).

2002

5. On February 15, 2002, Judge Atlas, convened a Discovery Conference and made the following statements:

a. Concerning Pertamina's failure to appear for a noticed deposition: "**Pertamina has done nothing in this case without being forced to do it.**" Tr. of Proceedings before S.D. Tex., Feb. 15, 2002 ("Feb. 15 Tr.") at 5:8-9 (emphasis added).

b. Concerning her skepticism about Pertamina's willingness to cooperate reasonably with discovery: "**Pertamina has not engendered a lot of confidence in me about its good faith.**" Feb. 15 Tr. at 14:3-4 (emphasis added).

6. On March 29, 2002, Judge Atlas convened a hearing on KBC's Motion for a Temporary Restraining Order regarding Pertamina's action in Indonesia seeking to prevent KBC from continuing with the enforcement proceedings in the United States. During that hearing, Judge Atlas made the following statements:

a. Concerning Pertamina's evasion of court orders: "**I'm concerned in the extreme about the apparent attempt to undercut or evade the jurisdiction of this Court** by going to Indonesia and trying to relitigate this matter and prevent KBC from pursuing its post-judgment efforts." Tr. of Proceedings before S.D. Tex., Mar. 29, 2002 ("Mar. 29 Tr.") at 5:11-15 (emphasis added).

b. Concerning Pertamina's willingness to follow court orders: "I have severe concerns because the

Indonesian court has been asked to do things which you now represent you don't intend to do. . ." Mar. 29 Tr. at 13:14-17.

7. On April 2, 2002, Judge Atlas convened a hearing on KBC's Motion for Contempt against Pertamina regarding Pertamina's violation of the Temporary Restraining Order regarding the Indonesian action. During that hearing, Judge Atlas made the following statements:

a. Concerning Pertamina's repeated evasion of court orders: "The concerns I have are **every time I issue an order or say anything, what comes back is some argument that gets around to – and so even my most, my hopefully most simple statements get evaded.** And I'm concerned about that." Tr. of

Proceedings before S.D. Tex., Apr. 2, 2002 ("Apr. 2 Tr.") at 17:8-16 (emphasis added).

b. Concerning Pertamina's violation of a prior Temporary Restraining Order: **"there was clearly a violation of the literal terms of my order . . . ."** Apr. 2 Tr. at 19:7-8 (emphasis added).

c. Concerning Pertamina's contempt:

> First of all, there is no question in my mind that Pertamina . . . had notice of my order to withdraw its injunctive relief request, and **there is no question in my mind that they chose for their own reasons, maybe logistical, maybe intentional, not to comply with that request.**
>
> There is no question that the Court order was in effect from the moment I issued it onward, so **I do find that Pertamina is in contempt, civil contempt. . . . Pertamina had the power to speak [in the Indonesian court], and chose not to for its business reasons.**

Apr. 2 Tr. at 32:11-21, 33:7-9 (emphasis added).

d. In discussing the contempt ruling, Judge Atlas exclaimed **"I'm furious, Counsel. I'm furious.** But I have issued what I think to be a temperate response. Don't test me." Apr. 2 Tr. at 42:7-9.

8. On April 11, 2002, Judge Atlas issued a Temporary Restraining Order and Order of Contempt against Pertamina regarding the Indonesian action. The Order contained the following statement: "The Temporary Restraining Order was clear and precise. There is no question, as evidenced by the record, that **Pertamina had notice of the Court's injunction issued March 29, 2002, and that Pertamina knowingly did not comply with the Order.**" S.D. Tex. Order, Apr. 11, 2002, at 4 (emphasis added).

9. On April 26, 2002, Judge Atlas issued an Order Granting a Preliminary Injunction against Pertamina regarding the Indonesian action. The Order contained the following statements:

a. "**Pertamina clearly seeks to circumvent this Court's rulings** by belatedly relitigating the validity of the Arbitral Award in a presumably more sympathetic forum." S.D. Tex. Order, Apr. 26, 2002 ("Apr. 26 Order"), at 14 (emphasis added).

b. "**Pertamina's efforts to relitigate the same issues actually decided by this Court is an obvious attempt to attack this Court's jurisdiction by relitigating old issues in a more favorable forum.**" Apr. 26 Order at 17 (emphasis added).

c. "Pertamina is much like the **vexatious** plaintiffs enjoined" in a similar case. Apr. 26 Order at 17 n.10 (emphasis added).

d. "The Indonesian Action appears to be no more than **a last ditch effort to avoid the effect of this Court's Judgment** enforcing the Arbitral Award." Apr. 26 Order at 18 (emphasis added).

10. On July 22, 2002, Judge Atlas issued a Memorandum and Order denying Pertamina's motion to stay enforcement of the U.S. judgment to permit Pertamina to pursue annulment in Indonesia. The Memorandum and Order contained the following statement: **"Pertamina has apparently continued, in direct violation of this Court's order, to prosecute the Indonesian action."** S.D. Tex. Mem. and Order, July 22, 2002, at 5 (emphasis added).

11. On July 22, 2002, Judge Atlas entered an Order requiring Pertamina to take specific actions in furtherance of the Preliminary Injunction regarding the Indonesian action. The Order contained the following statement: "**Pertamina did not comply with the TRO**..." S.D. Tex. Order, July 22, 2002, at 3 (emphasis added).

12. On December 5, 2002, Judge Atlas convened a discovery conference and made the following statement concerning Pertamina's failure to respond promptly to Court orders:

> I'm wondering whether, in fact, there is a lawyer with more knowledge of your client's goings on that should be participating in these phone calls. And I don't mean an American lawyers, I mean a lawyer who speaks English who is closer to the seat of power.

> And I'll tell you, I don't mean to cast dispersions on you. You may be doing the absolute best you can but you sit halfway around the world, and you constantly are saying, "I'm trying." And you're the only person that the courts have before us; and so, I am confused about what the best way is to impose enforceable and yet realistic time requirements for any and all of my rulings.
>
> I am open to suggestions from you because if the rulings are made and they're clear and your client doesn't comply within a reasonable amount of time or by a deadline that we've agreed is reasonable, I don't – I don't know what I'm supposed to do. **I don't want to put you in jail. I want to put somebody who's causing the problem in jail. . . but I need guidance from you about who is actually accountable for Pertamina for document production because I do not want to punish the messenger.**

Tr. of Proceedings before S.D. Tex., Dec. 5, 2002, at 11:10-12:8 (emphasis added).

13. On March 12, 2003, Judge Atlas convened a hearing in response to KBC's notification that Pertamina had not complied with the Court's rulings regarding discovery. During that conference, Judge Atlas made the following statements:

a. Concerning Pertamina's delayed responses to KBC's letters to the Court: "Frankly, I can't rule today. **My frustration is extreme. It is not only unfair for Pertamina to be responding so late, it is a gross imposition on the Court for me to deal with 100 pages of detailed discovery disputes in under 24 hours.**" Tr. of Proceedings before S.D. Tex., Mar. 12, 2003 ("Mar. 12 Tr.") at 3:2-7 (emphasis added).

b. Concerning Pertamina's dilatory conduct regarding discovery: "**I'm tired of the delays both to**

me and by Pertamina in general. . ." Mar. 12 Tr. at 3:11-12 (emphasis added).

14. On March 27, 2003, the High Court of Hong Kong issued a Decision denying Pertamina's summons to set aside a prior order to enforce the Arbitral Award. The Decision contained the following statement concerning Pertamina's delay in bringing its arguments:

> Normally the court would be inclined not to exercise the discretion in such circumstances. In this case, however, the balance would have been tipped against the norm for just one reason. **That reason being the lateness of the emergence of Pertamina's contentions.** The argument that the *lex arbitri* arbitration is Indonesian law and the complaint that the political risk policy was not disclosed, **can both be described as "11th hour" challenges. Such lateness would, in my judgment, dilute the strength of the arguments to the extent that it would have been appropriate to exercise the**

> **discretion to, nonetheless, enforce the award.**

Decision, No. HCCT28/2002, High Court of Hong Kong (Mar. 27, 2003), at ¶ 69 (emphasis added).

15. On June 18, 2003, the U.S. Court of Appeals for the Fifth Circuit issued an Opinion vacating the Preliminary Injunction regarding the Indonesian Action that was issued by the Southern District of Texas. The Opinion contained the following statements:

a. Concerning the possible hardships that KBC could face due to Indonesia's potential to assess fines on KBC for continuing with the U.S. litigation: "Although it is always possible for Pertamina to pursue enforcement of fines in third countries, it seems extremely unlikely that any country would countenance such a claim, given **Pertamina's dubious behavior**

throughout this process." *Karaha Bodas Co., L.L.C. v. Pertamina*, 335 F.3d 357, 369 (5th Cir. 2003).

b. Concerning Pertamina's delay in filing the Indonesian Action and misrepresentations:

> Only after Swiss courts had dismissed Pertamina's appeals, and the district court enforced the award in favor of KBC, did Pertamina file suit in Indonesian court. Regardless of its reasons for delay, its complete silence as to its ability to file in Indonesian court (based on the applicability of Indonesian arbitral law) throughout the span of litigation, is certainly **sufficient grounds to find Pertamina's behavior dubious and somewhat deceptive.** Whether or not the Indonesian court is a proper forum, Pertamina implied more than once that Swiss law was the applicable arbitral law in this dispute.

Id. at 369, n.50 (emphasis added).

c. Concerning Pertamina's behavior:

> [E]ven if **Pertamina is acting in bad faith by pursuing annulment in Indonesia (as it appears to be)**, the district court's attempt to enjoin Pertamina effectively translates into an attempt to enjoin the Indonesian court itself and to interfere with the sovereign actions of the GOI.
>
> . . .
>
> **It is true that Pertamina is likely in the wrong here**, and that Indonesia's injunction and annulment may violate comity and the spirit of the Convention much more than would the district court's injunction.
>
> . . .
>
> We empathize with the district court and share its **frustrations at the acts of Pertamina and its counsel**.

Id. at 372-75 (emphasis added).

2004

16. On January 27, 2004, the Honorable Thomas P. Griesa, of the U.S. District Court for the Southern District of New York, convened a hearing

regarding several outstanding turnover motions. During that hearing, Judge Griesa made the following statements:

a. Concerning Pertamina's argument that the Government of Indonesia's ("GOI") attempt to retroactively revoke Pertamina's retention fee for 2003:

> **What was the reason for that, to get out of this judgment?**
>
> . . .
>
> **I think that the position you are now taking is going to raise very, very considerable problems of credibility** because we have had continuous litigation on this matter, which you all know about. We have had a series of motions in 2003. We had many presentations, and we have had many presentations by counsel, and **I am going to tell you counsel's credibility is at stake here too.** If the retention fee was all over with as of the beginning of 2003, **then I was totally misled in the proceedings I have been conducting.**

> I asked in my questions about whether there had been any change of arrangement or change of method of calculation, because at some point, a couple of points in these voluminous papers, there was some hint that that that [sic] might be occurring; but those hints were contradicted, I believe, by the great weight of the presentations.
>
> . . .
>
> I am very concerned that the intention of this court and the intention of the Court of Appeals is being subverted. . .
>
> [W]hat your [Pertamina and the GOI] arguments do is **make a mockery** of what both courts [the S.D.N.Y. and the Second Circuit] have legitimately tried to achieve.

Tr. of Proceedings before S.D.N.Y., Jan. 27, 2004 ("Jan. 27 Tr.") at 13:12-13, 15:17-16:7, 24:12-14, 31:7-13 (emphasis added).

b. Concerning the effect of the retention fee change on the restraint of the funds:

> **I am going to tell you right now that if the name is changed,** obviously, if my ruling gets reversed it gets reversed, but the change of the name, **I hope nobody in Indonesia thinks that is going to avoid the restraint.** . . . I would hope that you would tell them that that will not occur.

Jan. 27 Tr. at 23:24-24:5 (emphasis added).

17. On March 4, 2004, Judge Griesa convened a hearing regarding security for the judgment where he made the following statement concerning Pertamina and the GOI's discovery delays:

> Mr. Slater and Ms. Lamm, what I see is I **don't get very satisfactory answers from your side about how the discovery is being handled**, and I am not going to sit here and try to struggle with this any longer. But it is quite apparent to me that your side of the litigation is not acting with any degree of urgency in trying to get the discovery concluded so that I am in a position to decide about the unadjudicated accounts. . . .

> I have a very slow moving discovery response from Pertamina.

Tr. of Proceedings before S.D.N.Y., Mar. 4, 2004, at 40:9-16, 40:22-23 (emphasis added).

18. On March 9, 2004, Judge Griesa convened a second hearing regarding security for the judgment and made the following statement concerning Pertamina's failure to cooperate with discovery orders: "I have a way to handle their failure to cooperate. **I can simply draw an inference against them. I have a right to sanction them. I have a right to strike their contentions.**" Tr. of Proceedings before S.D.N.Y., Mar. 9, 2004, at 11:16-11:19 (emphasis added).

19. On March 23, 2004, the U.S. Court of Appeals for the Fifth Circuit issued an Opinion affirming the Southern District of Texas' confirmation of the

judgment against Pertamina. The Opinion contained the following statements:

a. Concerning Pertamina's dilatory litigation tactics:

> Pertamina appealed to this court. During the appeal, Pertamina filed in the district court a motion to set aside the judgment under Federal Rule of Civil Procedure 60(b)(2), based on newly discovered evidence Pertamina contended should have been disclosed during the arbitration.
>
> . . .
>
> **We reject Pertamina's efforts to delay or avoid enforcement of the Award as evidencing a disregard for the international commercial arbitration procedures it agreed to follow.**

Karaha Bodas Co., L.L.C. v. Pertamina, 364 F.3d 274, 282 (5th Cir. 2004).

b. Concerning Pertamina's waste of judicial resources: "[T]he **length of this opinion reflects the number of arguments Pertamina raises to evade its obligations under the Award more than the strength of those arguments.**" *Id.* at 282 n.5 (emphasis added).

20. On April 22, 2004, the Judge Griesa convened a conference in response to Pertamina's promise to pay the entire judgment in the event that the Supreme Court denied *certiorari* regarding the confirmation of the judgment. During that conference, Judge Griesa made the following statements:

a. Concerning Pertamina's responsibility to pay for KBC's legal fees given the litigation's wastefulness:

> [Y]ou can keep on litigating 'till the cows come home if you want to do it.

I think I issued this warning before. From now on – I hope I did – but **at a certain point the legal fees are going to be paid by Pertamina and possibly the Republic of the other side.** We have had enough of this.

. . .

If you want to keep on litigating and you want to have depositions and you want to increase your liability for legal fees to your own client and to the plaintiffs, you are welcome.

That should not be necessary if you have any sense at all you will face reality, and the reality is you are going to liable for that judgment unless the Supreme Court overturns it. Why don't you all face reality and not have those people board the plane? **It is a silly exercise and the silliness will be the silliness of Pertamina and the Republic and you'll pay for it.**

. . .

Look, you have the ability instantly to get the judgment secured and call off the depositions. If you don't, you are going to be paying the other side's fees.

. . .

> **I urge you to make every attempt to end this litigation because it is just going to waste – it is going to be more money out of Pertamina's pockets and I don't want that any more than you do.**

Tr. of Proceedings before S.D.N.Y., Apr. 22, 2004 ("Apr. 22 Tr.") at 5:1-7:15 (emphasis added).

b. Concerning Pertamina's promise to pay the judgment: "[T]he letter is quite straightforward in agreeing to pay the judgment in the event that obviously – obviously in the event that the Supreme Court either denies cert. or affirms the – or the Texas litigation result." Apr. 22 Tr. at 2:15-18.

c. Concerning the relationship between Pertamina and the GOI: "[L]et's face reality. **The Republic owns Pertamina**, and I'm sure there is not

one breath that is taken by Pertamina in this litigation that is not coordinated with the Republic." Apr. 22 Tr. at 3:25 - 4:1-3 (emphasis added).

21. On May 7, 2004, Judge Griesa convened a telephonic conference regarding KBC's Motion for Turnover of Retention Fees Accrued Through November 2003. During that conference, Judge Griesa made the following statements:

a. Concerning the cause of the scheduling problems with regard to the motions for turnover:

> I suppose this is a waste of time, but there is a great deal of useless litigation going on
>
> . . .
>
> But all of this, of course, is created by the fact that there is still not firm security for this judgment. To me, that is a **complete waste of litigation**.
>
> . . .

> There is plenty of money in New York. I do not understand why the judgment simply can't be firmly secured. If it goes on after this point, and I have said this before, there is a **very strong likelihood of substantial sanctions.**

Tr. of Proceedings before S.D.N.Y., May 7, 2004 ("May 7 Tr.") at 2:3-3:3 (emphasis added).

b. Concerning the misrepresentations in Pertamina's filings regarding the 2003 Retention Fee:

> **I have read through all of the papers that exist on KBC's motion about the year 2003 and the arguments, I have to tell you, on the side of Pertamina and the Republic are really just terrible. They are literally potentially, in my view, the subject of sanctions.**
>
> . . .
>
> There is no citation to anything specifying January 1, 2003 as the end of Pertamina's retention fee. There is simply **out of thin air** a statement by Sahala and Yuwono.

Now, this is not a satisfactory briefing. It is not a satisfactory presentation. It causes **a huge waste of time by the Court and by KBC**, and I am telling you that this is not the end of the subject.

. . .

All this other effort to somehow backdate that regulation is just a terrible, it's **a terrible kind of briefing**.

. . .

Now, is there any chance of **facing reality** and getting the judgment secured?

. . .

I think that the only thing to do is to secure the judgment, and if you can't secure the judgment, I assume this **useless litigation** will keep going. But I want to warn you, I will not put up with **further obfuscation** of the issues. I will not put up with it, and **there will undoubtedly have to be sanctions for the conduct that has already occurred. It's just not tolerable in a federal court.**

I have just gotten through, as I say, a presentation on the part of Pertamina and the Republic, which I feel is wholly misleading.

May 7 Tr. at 2:17-21, 5:14-20, 6:4-6, 6:12-13, 6:23-7:4, 14:18-20 (emphasis added).

c. Concerning the GOI's arguments presented during the conference: "**Again, that obscures the issues**... So I would appreciate you sticking to the issues instead of trying to shift the issue. . . . Ms. Lamm, you're too smart not to get my point, and you're not addressing the point." May 7 Tr. at 7:13-24 (emphasis added).

22. On October 5-6, 2004, Judge Griesa convened a hearing regarding KBC's Motions for Turnover. During that hearing he made the following statements:

a. Concerning Pertamina's responsibility for KBC's legal fees:

> **Pertamina will be paying the legal fees of KBC. There is no reason for this complex litigation. There is none at all.**
>
> . . .
>
> **So I'm saying that after a certain point, the legal expenses of KBC will simply be added to the judgment.** And if you want to continue, of course I'm here to continue. But you are paying all the legal costs. Your client will pay.

Tr. of Proceedings before S.D.N.Y., Oct. 5, 2004 ("Oct. 5 Tr.") at 4:1-3, 4:15-18 (emphasis added).

b. Concerning the protracted nature of the litigation:

> [T]his has been an extraordinary litigation, caused by the failure to secure the judgment and now failure to pay that judgment, two and three quarters years of the most complicated and expensive litigation one case imagine, and **it's going to draw to an end.**
>
> . . .

> This must be concluded. **It's a veritable nightmare of litigation for the last two and three quarters years. And the continuance of it is not justified.**

Oct. 5 Tr. at 10:9-24 (emphasis added).

2006

23. On January 24, 2006, the U.S. Court of Appeals for the Second Circuit convened a hearing regarding the Southern District of New York's order and judgment directing turnover to KBC. At that hearing, the Honorable Sonia Sotomayor addressed Pertamina's counsel regarding the cause of the protracted litigation:

> [Y]ou guys were taking forever to get your proof in on how to calculate the five percent, proof that I still don't understand, so I have a great deal of sympathy for the District Court's inability to decipher what your position is on that five percent. Because this case, I think, could have been settled very easily if somebody – if both of you had agreed that five percent of NOI which your contract

> said clearly, and just agree to that before the District Court. **But it was Pertamina's position that five percent didn't mean five percent somehow.**

Tr. of Proceedings before 2d Cir., Jan. 24, 2006, at 22:16-23:6 (emphasis added).

24. On February 15, 2006, Judge Griesa convened a hearing regarding KBC's request for an accounting of the funds associated with the Kakap accounts where he made the following statement concerning Pertamina's refusal to pay its debts:

> The record of Pertamina's activity in this case has not been such as to give me confidence in their desire to do anything to pay their debts. There's a large judgment against Pertamina. They should pay it, and **they have done everything to make it as difficult as possible to recover that lawful judgment.** And that is not going to continue.

Tr. of Proceedings before S.D.N.Y., Feb. 15, 2006 at 11:14-20 (emphasis added).

25. On May 8, 2006, the Southern District of New York issued an Opinion ordering Pertamina to provide an accounting of, and turn over, the Kakap funds. That Opinion states concerning Pertamina's counsel's failure to comply with discovery orders:

> **However, in response to the directive regarding documents and information backing up the figure, Sherman & Sterling basically provided nothing.** All that was provided was a one-page chart containing the figures and a covering letter from the Head of Government Executive Agency for Upstream Oil and Gas Business Acting Head Division of Financial Operation, addressed to Pertamina, forwarding a "Financial Quarterly Report." The letter essentially contains no information, nor has the Financial Quarterly Report been produced by Shearman & Sterling.
>
> . . .

> As to the production of back-up documents and other information, **there has been a complete failure of compliance by both Pertamina and Shearman & Sterling.** Shearman & Sterling attempts to excuse this by saying that the information is in the custody of an entity called BP Migas, a separate company not controlled by Pertamina. However, it is impossible to believe that Pertamina does not have documents and other information accounting for the large amounts of money owed to it and showing how those amounts were calculated. Even as to BP Migas (which was specifically named in the March 8 order), there is clearly a sufficient relationship with Pertamina so that Pertamina, and BP Migas should be able to share relevant materials and probably do so in the course of business. In response to the order, **Shearman & Sterling had an obligation to use its best efforts to obtain the documents and information from BP Migas, as well as Pertamina. There is no indication that Shearman & Sterling has done any such thing.**

Karaha Bodas Co., L.L.C. v. Pertamina, No. 21-MC-00098 (TPG), 2006 WL 1226986, at *1 (S.D.N.Y. May 8, 2006) (emphasis added).

26. On August 25, 2006, Judge Griesa convened a hearing regarding KBC's Motion for Sanctions. During that hearing, Judge Griesa made the following statements:

a. Concerning the waste of judicial resources caused by Pertamina's failure to pay the judgment:

> **I will say this, that that decision required enormous work by the court, and I regard all of that totally useless,** that effort, and I think that there is a very, very big issue about whether further resistance to the payments of this judgment after the Court of Appeals decision in the spring of 2004, whether that was totally unreasonable.
>
> . . .
>
> But I suppose that the issues raised by Cleary Gottlieb were always within the realm of reason, but the overall picture was not within the realm of reason certainly, after the [Fifth Circuit a]ffirmed the District Court judgment in Texas, **there is absolutely no grounds to continue to**

> **fight this, and there was no possibility of getting certiorari from the Supreme Court, none at all. And even after that, that Court of Appeals' affirmance by the Fifth Circuit, there was a lot of hard work in this court which was totally unnecessary, completely unnecessary,** and then to have a sanction motion with 350 pages of briefs.

Tr. of Proceedings before S.D.N.Y., Aug. 25, 2006 ("Aug. 25 Tr.") at 7:19-24, 9:3-15 (emphasis added).

b. Concerning Pertamina's tactics:

> [T]he record is very clear that **Pertamina has used every possible device to delay the payment of a just debt.**
>
> . . .
>
> I will say to Pertamina's brand new counsel, who come from a distinguished law firm, that your client in a overall picture has used the process of this court in every conceivable way to **delay and prevent KBC from recovering on a lawful obligation and a lawful judgment.**

Aug. 25 Tr. at 8:2-17 (emphasis added).

c. Concerning KBC's concern that Pertmaina might bring an action against KBC elsewhere: "[E]**ven the possibility of further useless litigation is something that I want to be warned of**, and I want to know about if it's in the offing, in view of this long record which you are aware of." Aug. 25 Tr. at 17:14-17 (emphasis added).

d. Concerning the false evidence presented by Pertamina:

> If you can get to the issue, the issue here is **falsification of facts by persons from Pertamina.**
>
> . . .
>
> Was the testimony of Mr. Na'im on April 9, 2002, page 56, was it true or untrue?
>
> . . .

It was untrue, right?

. . .

I find it impossible to believe that he was simply mistaken

. . .

To say its mistaken doesn't go far enough as to the facts.

Aug. 25 Tr. at 73:8-10, 76:18-22, 77:22-24, 78:9-10 (emphasis added).

e. Concerning Pertamina's former counsel's assertion that the false evidence was immaterial: "I hate to say something about a lawyer who is not here, but [that is an] **absolutely groundless statement**: 'We respectfully submit, however, that this information is immaterial for the purposes of this case.' ... How it could be more material I cannot conceive." Aug. 25 Tr. at 42:20-23 (emphasis added).

f. Concerning Pertamina's current counsel's explanation that Na'im's false testimony only involved one of the issues in the case: "**Does that excuse Pertamina from lying about who owned the refineries?**" Aug. 25 Tr. at 82:1-2 (emphasis added).

g. Concerning Pertamina's failure to provide the discovery requested by KBC's counsel to clarify the contradictions in the evidence presented by Pertamina:

> **Then the next problem, what Mr. Dugan did was, and he could have used a different tactic,** he could have asked for a hearing on the refineries in this court, but what he did was try to get discovery. He certainly knew there were indications that the refineries were owned by Pertamina, the agreement with the Export-Import Bank and so forth. So he tried to get those contradictions resolved, and the contradictions between some documents and the testimony of the chief financial officer. **And so he tried to get discovery, and the discovery wasn't furnished.**

Aug. 25 Tr. at 82:8-17 (emphasis added).

h. Concerning Pertamina's culpability for the false testimony: "**Pertamina was the ultimate source of the facts, and they had the responsibility to see that the court and the plaintiffs were properly informed.**" Aug. 25 Tr. at 103:18-20 (emphasis added).

i. Concerning Pertamina's mistreatment of its counsel:

> Pertamina was represented by Cleary Gottlieb . . . finally I think they had enough. I think Cleary Gottlieb resigned, or whether they resigned or were discharged it doesn't make any difference. **The record shows that Pertamina was, to use the vernacular, chiseling them on the fees**, among other things, and it was quite obvious that finally Cleary Gottlieb had enough of it; and now it's been taken over [sic] the joyful task has been taken over by Shearman & Sterling. Congratulations.

Aug. 25 Tr. at 8:18-9:2 (emphasis added).

27. On September 26, 2006, Judge Griesa convened a hearing regarding KBC's Motion for Injunction Concerning Litigation in the Cayman Islands. During that hearing, Judge Griesa made the following statements:

a. Concerning Pertamina's timing in bringing its action in the Cayman Islands:

> **And here we have on the very eve of the distribution after all these years, on the very eve we have this application to the Cayman Islands court to prevent the orderly use of the money. If that is not an interference with the jurisdiction I don't know what is.**
>
> . . .
>
> It seems to me anybody who is a lawyer or a judge, it is most unfortunate that this allegation of fraud, **which I believe was available to Pertamina a long time ago,**

> **to have now, after all the litigation that has gone on, to have a fresh lawsuit in the Cayman Islands purporting to raise these issues so that the litigation may be strung out for. . . a long further time, it is the kind thing which really the law should try to avoid. It is a terrible – it is a terrible thing.**
>
> . . .
>
> This Court will not countenance activities by Pertamina in bringing a lawsuit in the Cayman Islands to prevent KBC from having the fruiting of its judgment, will not countenance such a thing being done half a month before the likely conclusion of this case – conclusion of the relevant proceedings with the Supreme Court.

Tr. of Proceedings before S.D.N.Y., Sept. 26, 2006 ("Sept. 26 Tr.") at 27:17-21, 30:15-24. 52:23-53:3 (emphasis added).

b. Concerning his impressions of the Cayman Action:

> **[T]he record here, as far as Pertamina is concerned, in my view is just atrocious, and to come in with something which they could have come in with long ago, in the first place, the idea that this is newly discovered evidence is so suspect that I just affirmatively say that it is simply probably not true.** I'm not saying it is conclusively, but for the purpose of my ruling, **I think the probabilities are very, very strong that this is a flat misrepresentation.** So that is not a small thing.

Sept. 26 Tr. at 56:2-10 (emphasis added).

c. Concerning the impact of the Cayman action on the pending Sanctions Motion: "**[W]hat I am really looking for are lies, and there were some of those. And if that is repeated in this exercise there will be sanctions.**" Sept. 26 Tr. at 2:15-17 (emphasis added).

28. On December 8, 2006, Judge Griesa issued an Opinion enjoining Pertamina from prosecuting its

Cayman Action and initiating similar actions elsewhere.

That Opinion states:

a. Concerning Pertamina's concealment of its intention to bring the Cayman Action:

> [T]here can be no doubt about the fact that Pertamina was planning the Cayman Islands action as of August 28 and probably for a substantial period of time before that. **Also, there can be no doubt that both Pertamina and its attorneys knew full well that the Court's questions were directed to finding out whether the Supreme Court's denial of certiorari would mean final termination of all litigation,** so that KBC could be paid out of the funds restrained in New York. Obviously the Court did not know enough to ask specifically if Pertamina planned to a new action in the Cayman Islands. **But an honest look at the Court's inquiry and an honest response would have led to the disclosure of the plan to bring such an action.**
>
> There was, of course, no such disclosure. **The circumstances strongly support an inference that concealment by**

> **Pertamina was deliberate and with a purpose.**

Karaha Bodas Co., L.L.C. v. Pertamina, 465 F. Supp. 2d 283, 288-89 (S.D.N.Y. 2006) (emphasis added).

b. Regarding Pertamina's timing in bringing the Cayman Action:

> **[I]t is necessary to reckon with the tactics employed by Pertamina.**
>
> . . .
>
> **If Pertamina had the documents in March 2001, as KBC claims, it had ample time to file a motion under Rule 60(b)(3) in the Texas district court within the one year time limit.**
>
> Of course, Pertamina asserts that it did not look at the documents until August 2005, and therefore did not appreciate their significance until that time. Even if this is true, **there is surely a serious problem about Pertamina's diligence . . . In view of this campaign against KBC, it is difficult to justify Pertamina's delay of three years or more in looking at documents left in its possession by KBC.**

However, in an attempt to head off possible further problems, the Court, in August 2006, asked counsel for Pertamina whether there would be any further issue which might come up following the likely denial of certiorari by the Supreme Court. **On August 28, 2006 the attorney for Pertamina wrote the Court basically assuring the Court that a denial of certiorari by the Supreme Court would be the end, and specifically stating that Pertamina did not object to payment of the judgment.**

Counsel for Pertamina has stated to this Court that he did not know, when he wrote that letter, that Pertamina planned to file the action in the Cayman Islands. **But, of course, Pertamina knew. It deliberately concealed its plan from this Court and deliberately failed to have its attorney disclose that plan in the August 28 letter. No other conclusion is possible.**

. . .

It is significant that, on December 31, 2003, Alfred Rohimone, Pertamina's Finance Director, told the prominent Indonesian newspaper Kompas that the arbitration decision could no longer be disputed, but that **"what Pertamina is doing now is actually only buying time." Pertamina's**

> **tactics in the Cayman Islands action are completely consistent with "buying time." . . . Pertamina held back, waiting until the very last moment before the litigation was to be terminated. It concealed its strategy from this Court in response to a direct inquiry, and then filed an action in a foreign court.**

Id. at 297-98 (emphasis added).

c. Concerning the effect of the Cayman Action on the jurisdiction of the United States' courts:

> **This court has the power, and indeed the duty, to deal with the abusive litigation tactics used by a party before it . . .** Finally, at the very moment when the litigation was to be legitimately ended, **Pertamina brought the action in the Cayman Islands after engaging in literal subterfuge dealing with the Court in New York. The purpose of this lawsuit is to effectively wipe out the effect of the United States judgments and to do this with as great an amount of delay as possible.**

Id. at 300 (emphasis added).

2007

29. On April 30, 2007, the Southern District of New York found that Pertamina's perjurious actions during these proceedings was sanctionable, and awarded KBC $500,000 in sanctions. The decision contained the following statements:

a. Concerning Pertamina's failure to comply with discovery orders: "**Pertamina did not produce the required discovery**. . . . It is true the KBC was obliged to apply for additional discovery, and that compliance with the discovery order of the Texas court was greatly delayed." *Karaha Bodas Co., L.L.C. v. Pertamina*, No. 21-MC-00098 (TPG), 2007 WL 1284903, at **4-6 (S.D.N.Y. Apr. 30, 2007) (emphasis added).

b. Concerning the significance and intentional nature of the perjurious testimony submitted by Pertamina:

> [T]he **falsification by Na'im in his deposition was intentional and had the purpose of leading KBC and the court off the track** in seeking to apply the proceeds of the petroleum accounts to the large judgment debt. There was **no excuse for this deception, perpetrated by the Chief Financial Officer of Pertamina.** The court concludes that **the matter is serious** enough to justify the invocation of the inherent power of the court to impose sanctions.
>
> . . .
>
> **Pertamina and Na'im knew of the great significance of the issue being addressed and knew that the testimony being given had an important bearing on whether KBC would be able to recover the $261 million arbitration award,** which had then been reduced to judgment in the District Court in Texas. Since the issue was highly important, **the falsification of the testimony was grave indeed** [and] to pass the matter by without even a civil

> penalty would be, in the view of the court, a failure in the performance of the court's duty.

Id. at *6 (emphasis added).

c. On the decision to impose a monetary sanction against Pertamina:

> [T]he court is imposing sanctions against Pertamina because of the false testimony of a Pertamina official . . . the court finds that **Pertamina engaged in willful misconduct, through falsification of deposition testimony, and that this misconduct cannot be allowed to go without penalty.**
>
> . . .
>
> **[T]he falsification of Na'im was most serious [and] the court believes that the false testimony of Na'im cannot be passed without a penalty.** There should be a **substantial penalty**, . . . the court has decided to impose sanctions on Pertamina in the amount of $500,000.

Id. at **1, 6 (emphasis added).

30. On May 21, 2007, the Court of Appeals for the Second Circuit convened a hearing regarding the Southern District of New York's injunction preventing Pertamina from continuing its Cayman Action. At that hearing, the Second Circuit judges engaged in the following colloquy regarding Pertamina's misrepresentations regarding its intentions to bring the Cayman Action:

> JUDGE CABRANES: Judge Griesa asked your client shortly before the Supreme Court was to rule on your client's cert. petition whether it would agree to release to KBC the funds that the district court had ordered turned over . . . and your client, through counsel, told the district court by letter dated August 28th, 2006, that it would, quote "not object before this Court to payment of the judgment," correct?
>
> MR. SINGER: That's correct.

. . .

JUDGE CABRANES: . . . At the time that Sherman and Sterling wrote that letter, your client was planning to initiate an action in the Cayman Islands, right?

MR. SINGER: I don't believe so, Your Honor. There's no evidence in the record to show that . . .

JUDGE CABRANES: And you think – and **you're prepared to make the argument that this very clever formulation in the letter was a complete coincidence, I suppose. Quote, . . . "Pertamina would not object before this Court to payment of the judgment." By happy coincidence, that locution two weeks later becomes the basis of your argument here that there was no connection between these two, yes?**

. . .

JUDGE BERMAN: And you're telling us that your client didn't know at the time of this August 28 letter – at the time that Sherman & Sterling was writing that letter that it, Pertamina, had no intention of actually acquiescing to the district court's

judgment and letting the funds pass free and clear to KBC?

. . .

JUDGE CABRANES: **Why would anyone use this curious locution before this Court if it wasn't to try to be evasive with respect to something that would transpire later? . . . I mean wouldn't the normally English language statement that if you intended to simply acquiesce to the district court's judgment and let the funds pass free and clear to KBC, you would have said something roughly like that. You wouldn't have seized upon this clever locution "not object before this Court the payment of the judgment."**

MR. SINGER: I don't know, Your Honor.

JUDGE CABRANES: . . . **It certainly looks curious at a minimum, perhaps even apparent that Pertamina is trying to evade the jurisdiction of the district court and to effectively to be free to move this dispute to yet another forum.**

Unofficial Transcript of Proceedings, 2d Cir., May 21, 2007 at 20-29 (emphasis added).

31. On September 7, 2007, the Court of Appeals for the Second Circuit issued an opinion affirming the Southern District of New York's decision enjoining Pertamina from prosecuting its Cayman Action and initiating similar actions elsewhere. That Opinion states:

a. Concerning the protracted length of the litigation:

> We further note that the scope and duration of this litigation militate heavily in favor of a swift and definitive resolution of the dispute over the injunction.
>
> . . .
>
> [T]he Cayman Islands action follows what, by any account is, an **extraordinarily complex and protracted series of proceedings**. At oral argument, KBC informed the Court (and Pertamina did not dispute) that **Pertamina's resistance to confirmation and enforcement of the Award has required KBC to appear in**

> **more than fifteen courts in seven nations over the past nine years,** including five appearances in our Court alone, in support of its enforcement efforts.

Karaha Bodas Co., v. Pertamina, 500 F.3d 111, 120 n.12, 127 n.18 (2d Cir. 2007) (emphasis added).

b. Concerning the necessity of the injunction: "Were we to vacate the District Court's injunction, Pertamina would be free to engage in **vexatious proceedings that**, as discussed, **are intended to undermine or vitiate federal judgments.**" *Id.* at 129-30.

32. On October 9, 2007, the High Court of the Hong Kong Special Administrative Region Court of Appeal issued an opinion rejecting Pertamina's appeal of the High Court's enforcement of the Arbitral Award, which was based on allegations of fraud. That Opinion states:

a. Regarding Pertamina's strategy in bringing its new appeal:

> What Pertamina is trying to do is to put a different gloss on the same case and use the discovered documents as a pretext for another attack on the Award.
>
> . . .
>
> The assertion of fraud on the part of KBC in effect became the 'admission ticket' into what began to resemble a detailed reargument of the case and a rehearing of the very matters with which the learned arbitrators had been seized, albeit without, of course, sight of the 'new' documentation.

Decision, Civil Appeal no. 121/2003, High Court of the Hong Kong Special Administrative Region Court of Appeal (Oct. 9, 2007), at ¶¶ 80, 124.

b. Regarding the impropriety of Pertamina's appeal:

> In my view the course that this case has taken represents a **paradigm example of**

> **what should *not* occur in the context of enforcement of Convention awards,** wherein an alleged case of fraud is used as the 'hook' to reopen argument upon the entire case hitherto the subject of full arbitral consideration. In opening this appeal [Pertamina's counsel] had noted that Pertamina anxiously had been awaiting its 'day in court', but for my part I regret to say that **I consider this appeal to have been singularly lacking in merit.**

Id. at ¶142 (emphasis added).

c. Regarding the merits of Pertamina's "fraud" claims:

> **There is nothing in this complaint.**
>
> . . .
>
> **[T]his plea did not achieve the level of a "*prima facie case*", much less the standard of a "reasonable prospect of success."**
>
> . . .
>
> In the present case, for the reasons given by the Vice-President, **I do not think Pertamina comes anywhere near to**

> **establishing that the new evidence would have an important influence on the outcome of the arbitration. Further, I do not think they show any fraud practiced by KBC at the court below or for that matter, at the arbitration proceedings.**

Id. at ¶ 109, 134, 154 (emphasis added).

33. On October 11, 2007, the Grand Court of the Cayman Islands issued an opinion dismissing with prejudice Pertamina's Cayman Islands' action and awarding costs to KBC. That opinion states:

a. Regarding Pertamina's repeated attempts to delay the enforcement of the Arbitral Award:

> The disputes between [Pertamina and KBC] were the subject of a final arbitral award in favour of KBC made as long ago as December 2000. The jurisdiction governing the arbitration was Switzerland, where Pertamina's attempt to annul the award was rejected in August 2001. There has since followed over the subsequent 6

> years a plethora of litigation in various jurisdictions, including Indonesia, Hong Kong, Canada, Texas and, most relevant for this purpose, New York, in which **Pertamina has attempted by one means or another to avoid or delay enforcement of the arbitral award.**
>
> . . .
>
> It has become very clear over several years that **Pertamina has been adopting increasingly desperate tactics to avoid or delay its liability under the arbitral award.**

Decision, Cause No. 386 of 2006, Grand Court of the Cayman Islands (Oct. 11, 2007), at 5-6 (emphasis added).

b. Concerning Pertamina's purpose behind bringing the Cayman Action:

> Suffice it to say that it is clear to me that **Pertamina brought and pursued these proceedings before this Court in a further attempt, not only to avoid or delay its established liability under the arbitral award,** (which award clearly had no connection whatever with this

> jurisdiction other than the purely incidental fact that KBC is registered as a Cayman Islands company) **but also in an attempt to undermine or avoid the consequences of the judgments** of various courts worldwide and, most recently, those of the US federal courts.
>
> . . .
>
> **I am satisfied that in all the circumstances the description by the New York Court of Pertamina's proceedings before this Court as 'an abusive litigation tactic' is entirely justified.** It is clear that the proceedings amount in the circumstances to an attempt to use this Court for a collateral purpose, [namely] **an attempt to further delay and avoid the enforcement of the arbitral award made almost 7 years ago. In my view that was improper and unreasonable and as such an abuse of this Court.**

Id. at 6 (emphasis added).

c. Regarding the impropriety of the Cayman Action, the Cayman Court echoed the views of the Hong Kong Court of Appeals:

> In dismissing Pertamina's claim the Hong Kong Court of Appeal said in its judgment of 9th October 2007 "**this is a paradigm example of what should not occur in the context of enforcement of Convention awards**"; this applies in my view equally, indeed even more so, to the proceedings before this Court. **In my judgment these proceedings were improperly and unreasonably brought and maintained by Pertamina and amount to an abuse of this Court.**

Id. at 7 (emphasis added).

34. I declare under penalty of perjury that the foregoing is true and correct. Executed in New York, NY on December 10, 2007.

s/ James E. Berger

James E. Berger

Respectfully submitted,

CHRISTOPHER F. DUGAN
Counsel of Record
MATTHEW F. STOWE
JAMES E. BERGER

KAYCEE M. SULLIVAN
PAUL, HASTINGS, JANOFSKY
& WALKER LLP
875 15th Street, N.W.
Washington, D.C. 20005
(202) 551-1700

Attorneys for Respondent

APPENDIX 3 — EXCERPTS OF TRANSCRIPT OF S.D.N.Y. PROCEEDINGS DATED SEPTEMBER 26, 2006

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

21 MC 98

KARAHA BODAS CO.,

Plaintiff,

v.

PERTAMINA,

Defendant.

September 26, 2006
3:45 p.m.

Before:

HON. THOMAS P. GRIESA,

District Judge

(Case called)

THE COURT: It's your motion, Mr. Dugan.

MR. DUGAN: Thank you, your Honor.

Your Honor, just to start off, I know you have heard me express my concern on previous occasions about the

veracity of statements that have been made by Pertamina to this court but I have to tell you that this latest filing by Pertamina has really outraged me. There are some statements in here that are just so wrong and so misleading to the court that I just have to bring them to the court's attention.

THE COURT: I wanted to say this: I have before me a sanctions motion which I am going over quite carefully and there was a great deal of that litigation which involved legal positions which although to a large extent they were losing positions, they certainly cannot be sanctioned. But what I am really looking for are lies, and there were some of those. And if that is repeated in this exercise there will be sanctions. I will either do it on my own or I will entertain another motion. But we are not here for a sanction motion. We are here to arrive as quickly as we can at what I really think is a remedy which is partly I believe agreed upon by Shearman & Sterling.

But before we get to that, you go ahead with your argument. It's late in the day and we don't have a lot of time.

MR. DUGAN: All right, your Honor. If I can draw your attention to page 3 of Pertamina's opposition to KBC's application for an anti-suit injunction. Pertamina states at the bottom of that page —

THE COURT: A little louder and slower.

MR. DUGAN: Certainly, page 3, the bottom of page 3. The third line from the bottom it talks about on the basis of evidence that became available only in August 2005. Now, your Honor, that goes to the crux of the evidence that is at issue in the Cayman Islands. These are documents that were turned over to Pertamina not in 2005 but at worse in 2002 and probably in 2001. And that is admitted in the exhibits that are filed with this application itself. For Pertamina to claim before this court that the evidence only became available in August 2005 is just a blatant lie. It's been known to Pertamina. They admitted they have had these documents for at least 4 years and probably 5-1/2 years. This is not recently discovered evidence.

THE COURT: When it says evidence which became available only in August 2005, what is that evidence? The evidence, I take it, is identified in the record here?

MR. DUGAN: Correct.

THE COURT: What is that evidence?

MR. DUGAN: It's the evidence filed primarily in the Panjaitan affidavit.

* * *

THE COURT:

* * *

to grant that motion this afternoon, but I'm not saying that the motion is denied. I simply reserve decision on it. What we have discussed — and this was certainly something that was at least implicitly embraced in the motion of KBC — is some more limited relief, because KBC surely did what motions generally do, ask for such other and further relief as the Court deems just and proper. Different relief does seem just and proper to the Court. What I am directing my attention to is both the request for injunctive relief in the original Writ of Summons and also the Amended Summons, which deals with what I suppose could be called the provisional relief requested in the Cayman Islands by Pertamina.

There was a request in the original summons for an injunction against any further prosecution or any proceedings directed to the enforcement of the arbitral award. It has been conceded by Pertamina, through counsel, that Pertamina is in fact not intending to ask the court in the Cayman Islands to enjoin the conclusion of the court proceedings here. Specifically, it is conceded that there is no intention to prevent the turnover of the funds to KBC in the event that certiorari is denied and the orders of this Court do in fact become final.

In other words, Shearman & Sterling, on behalf of Pertamina, has assured the Court that there is no backing away from the literal terms of Shearman & Sterling's letter of August of this year.

Now, in order to make sure that there is no misunderstanding and no mistake about that commitment, I am going to enter an order which I believe has the consent of Pertamina, and that order is that Pertamina is enjoined and prohibited from making any request to the court in the Cayman Islands to have that court enter any kind of an order or injunction which would interfere with the further processes of this court enforcing the arbitral award, including the turnover of the funds that have been restrained in the event that certiorari is denied by the Supreme Court.

I don't doubt for a minute Mr. Weisburg's assurance on behalf of Pertamina, but to prevent any misunderstanding, because there is a foreign court involved, that injunction, which I'll refer to as a consent injunction, will be entered, and that is the direction of the Court as of this moment.

Now, what is not consented to is what I want to discuss now.

The original Writ of Summons in the Cayman Islands court asked for an injunction against KBC preventing KBC from dealing with or disposing of any sums received as a consequence of the fraud, deceit and so forth, the wrongdoing alleged against KBC.

In the Amended Summons, it appears, on the basis of that Amended Summons, Pertamina will request the Court in the Cayman Islands to restrain, pending the conclusion of the trial of the action there, any disposal

of any funds received by way of the enforcement of the arbitral award. Consequently, what is going to be requested in the Cayman Islands court is an injunction against KBC directing that KBC must hold the funds turned over to it and must hold those funds for the benefit of the Cayman Island action.

It is my view that such an order would be sharply at odds with the rulings of this Court and would interfere with the carrying out of the lawful orders of this Court.

What we have is a litigation which goes back six years, starting with the arbitration, going on to the confirmation action in the federal court in Texas and going on to the Fifth Circuit and then continuing in this court. In that lengthy, arduous and expensive litigation, KBC won a valid arbitration award, won a valid judgment in its favor, in the federal court in Texas. That meant that KBC was entitled to recover on that judgment, was entitled to the money that was awarded in the arbitration award and in the judgment.

The judgment debt has been the subject of extensive proceedings in the Southern District, and what this Court has entertained is applications and proceedings by KBC to obtain the money represented by the judgment. The premise on which this Court has acted in these enforcement proceedings has been that there is a valid judgment awarding a substantial sum of money to KBC, and that means that KBC was entitled to that money.

If Pertamina had come along in the federal court in Texas, or even in this court, and made a collateral attack on the arbitration award, there would have been jurisdiction to hear that collateral attack. No such attack was made, meaning that the courts in Texas and in New York have been acting on the premise that there was a valid judgment in which KBC was entitled to the monetary proceeds of that judgment. If that were not to be the case, there was a vast waste of time in this court, aside from what went on in Texas and in the Fifth Circuit.

Now, we don't know when the Supreme Court will act on the certiorari petition, but the expectation of the lawyers is that this will occur in early October, and presumably Pertamina was apprised of that expectation and of that likelihood. About a half a month before, Pertamina brings this action in the Cayman Islands.

Now, Pertamina asserts that there is newly discovered evidence. That is hotly disputed. And I am not attempting to rule on that now; I will get to that at a later proceeding. But the indications are strong enough for me to refer to them to the effect that the evidence on which the Cayman Islands' action purports to be based was not something discovered by Pertamina somewhere close to September 15, 2006.

Apparently in a proceeding in Singapore brought by KBC, Pertamina referred to these allegations of fraud, maybe not all of them, but to the basics. KBC did not go forward with the enforcement action in Singapore,

but the important thing is Pertamina did not go forward with an affirmative claim to do what it is now attempting to do in the Cayman Islands, and that is to vitiate the arbitral award — something that could have been done in Singapore or elsewhere, the "elsewhere" being perhaps the Southern District of Texas or this court.

Under these circumstances, this Court is entirely unwilling to allow Pertamina to use the Cayman Islands court to prevent KBC from enjoying the normal fruits of recovery on its judgment.

It is the normal course of things that a judgment creditor receives the money owed on a judgment, owns that money, and can use that money. If KBC were now allowed to receive the money but were required to hold it as if there were some attachment or lien on it, this would be a drastic departure from what the courts in the United States have been contemplating for all these years and surely a departure from what this Court has been contemplating in all the very arduous activities engaged in by this court.

This Court will not countenance activities by Pertamina in bringing a lawsuit in the Cayman Islands to prevent KBC from having the fruition of its judgment, will not countenance such a thing being done about half a month before the likely conclusion of this case — conclusion of the relevant proceedings with the Supreme Court.

Consequently, in addition to the consent injunction, which I referred to earlier, this Court hereby enjoins Pertamina from seeking any order or injunction from the court in the Cayman Islands interfering with the use of the money turned over to KBC, that is, the use by KBC of such money.

I recognize full well — and I specifically asked about this — that KBC is likely to distribute that money by way of dividend to the partners in the venture. I recognize that. It is exactly what I believe should be done and make no mistake about it — I amend that. It is exactly what KBC should be free to do, and I want to be explicit about it and have no misunderstanding about it.

The orders that I am referring to are effective immediately, and I am prepared tomorrow to sign a formal order, which I assume KBC will submit on notice, but it must be on short notice. Tomorrow is Wednesday, and presumably there are some proceedings in the Cayman Islands on Thursday, and, therefore, I should sign an order tomorrow.

MR. DUGAN: We will have a draft to you tomorrow morning on notice, your Honor.

THE COURT: Thank you very much.

MR. WEISBURG: Your Honor.

THE COURT: Yes.

MR. WEISBURG: May I address two subjects—

THE COURT: Yes.

MR. WEISBURG: — as a result of those orders?

First, we think that in these circumstances KBC is obligated to post a bond. Essentially, they have obtained a preliminary injunction and a bond should therefore be required.

And we will not beat around the bush. The bond, frankly, should be in the amount of any distribution that they may receive from the Bank of America, because, again, the object here is not to prevent the turnover, we are standing by our word on that, but to prevent KBC from going out of business and becoming just a plaque on the wall and defeating any future judgment enforcement that may eventually — after proceedings in Cayman.

THE COURT: Motion denied.

MR. WEISBURG: OK. Second, your Honor, we would ask for essentially a stay pending appeal, and we obviously haven't been authorized to appeal, but that's something that will have to be considered; and we would ask for a stay in the form of an order that KBC not make the distribution they're talking about making, again so that should this Court be reversed on appeal

and the Cayman Island be permitted to consider provisional relief, that that provisional relief will be available and, again, that any judgment that may be obtained at the end of the Cayman proceedings will not go unsatisfied.

Of course, if we do appeal, we will commit to seek expedited consideration by the Second Circuit.

MR. DUGAN: May I address that, your Honor?

THE COURT: Yes.

MR. DUGAN: That would be the equivalent of giving them the prejudgment attachment. Prohibiting KBC — by staying your order until the Second Circuit decides on it could result in months and months and months of delay. We don't even have the money yet. It is just entirely inappropriate. It is entirely inappropriate to put in place any form of prejudgment attachment in aid of the Cayman proceeding in any way whatsoever.

MR. WEISBURG: Your Honor, while I'm sure the KBC would be unhappy, it is absolutely not giving us the relief that the Cayman court would possibly or has been asked to render, but would simply protect us in the event that the Second Circuit may elect to reverse. It is not depended on any action in the Cayman Islands. It would only be depended upon what the Second Circuit may decide to do.

MR. DUGAN: Your Honor, then let them convince the Second Circuit, if that is the case.

THE COURT: Well, I'll tell you what. I'm into this more than Second Circuit could be, and I think the Second Circuit would be glad for a careful ruling by me on this application for a stay.

I have to tell you, Mr. Weisburg, the record here, as far as Pertamina is concerned, in my view is just atrocious, and to come in with something which they could have come in with long ago, in the first place, the idea that this is newly discovered evidence is so suspect that I just affirmatively say it is simply probably not true. I'm not saying it is conclusively, but for the purpose of my ruling, I think the probabilities are very, very strong that this is a flat misrepresentation. So that is not a small thing.

And I want that finding to be stated, and if there is an application to the Court of Appeals on this matter, I want them to understand my finding on that.

However, there is no doubt that Pertamina has a right of appeal, and if there is a need for a certificate, I would grant it. This is an appealable question, this kind of an injunction. And what I would like to see is — I don't want to, frankly, give an inch to that, the idea of what Pertamina is seeking in the Cayman Islands. However, you're absolutely right, I'm not dealing with the Cayman Islands now, I'm dealing with the Second Circuit, and I've got to respect them and their processes.

This may be -- some people might say it is more symbolism than substance, but I cannot present the idea to the Court of Appeals, if they have this appeal, they might disagree with me and then there is no money. I would like to have you consider with your clients, I believe the money should be paid.

MR. WEISBURG: We are not disputing that, your Honor.

THE COURT: I'm saying paid to KBC. I believe that if KBC wants to give the money to the partners, they should be able to do that.

What I would like to do is to have an undertaking that in the event of a reversal, I would like to have — again, this may be more symbolism than substance, and I'm sorry, but the symbolism means something. I would like to have some assurance in some way that the money would be returned to KBC and held by KBC in the event I am reversed.

What I'm saying is KBC wants to distribute the money to Florida Power and to the other company. If those companies will invest the money but undertake to return equivalent funds in the event of a reversal, that's what I would like to suggest.

* * * *

APPENDIX 4 — EXCERPTS OF TRANSCRIPT OF S.D.N.Y. PROCEEDINGS DATED AUGUST 25, 2006

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

New York, N.Y.

21 MC 00098

KARAHA BODAS CO., LLC,

Plaintiff,

v.

"PERTAMINA," et al.,

Defendants.

Before:

HON. THOMAS P. GRIESA,

District Judge

* * *

THE COURT: That is not particularly identified with one stream versus another stream?

MR. DUGAN: It's not identified with any stream at all.

THE COURT: Just a fund.

MR. DUGAN: Just a fund, a fund to pay any amount that you conclude belongs to Pertamina, and subject to execution by KBC, and that is how it's worked since then. For example, when the Kakap $25 million, that Pertamina conceded was its own money, was identified in May of this year, that payment came out of that fund even though there was no specific identification of Kakap funds going into it. So that's how it's worked. It's the equivalent —

THE COURT: Let's suppose, let's assume that the Supreme Court denies cert. Where do we go from there?

MR. DUGAN: At that point, if the Supreme Court denies cert, which we fervently hope for, we will submit to your Honor a calculation, a final calculation of the amount of the judgment, and we will credit — we have recovered some minor amounts in Hong Kong from our enforcement efforts there, and obviously we will credit the amounts from Hong Kong to the existing amount of the unpaid judgment, and we will come up with a final figure, and we will submit and work and turn over to your Honor and ask you to —

THE COURT: I assume that the amount that is tied up will then be paid to KBC?

MR. DUGAN: That is correct.

THE COURT: And there is no further issue, right?

MR. DUGAN: There is one further issue, your Honor, and this has come up only recently, and in proceedings in Singapore, enforcement proceedings in Singapore, Pertamina alleged that KBC, back in the years 1998, 1999, 2000, perpetrated a fraud in the arbitration tribunal by withholding certain documents that Pertamina alleges are central to the resolution of the disputes in the underlying arbitration.

We believe those arguments, those allegations are wholly baseless. Nonetheless, Pertamina told the court in Singapore that if the court in Singapore issued a finding of fraud, it was going to start a new action in the United States to try to recover all the finds that had been paid, a new fraud action in the United States.

We don't know what Pertamina's intention is, but it's entirely possible, based on what Pertamina told the Singapore court, entirely possible that even if the Supreme Court denies the petition for cert. from the Second Circuit, even if that happens we may still be facing —

THE COURT: I will ask Mr. Weissburg, what about that? Is there any intention to have further litigation, or can we end it? If the Supreme Court denies cert, will the money simply be paid to KBC or not?

MR. WEISSBURG: Your Honor, I have no instructions to commence an action.

THE COURT: I think you better get instructions. I would like instructions. How soon can you get instructions?

MR. WEISSBURG: Your Honor, I am not handling the matter in Singapore. I am not aware —

THE COURT: But you are handling the matter in New York, right?

MR. WEISSBURG: I am.

THE COURT: You represent Pertamina in New York?

MR. WEISSBURG: I do, your Honor.

THE COURT: In this court, right?

MR. WEISSBURG: Absolutely.

THE COURT: I want to know the answer.

MR. WEISSBURG: I can't answer the question, your Honor.

THE COURT: When can you get an answer?

MR. WEISSBURG: I can communicate with my client. All I can tell the court is I have no instructions and I am not prepared —

THE COURT: I would like an answer by tomorrow, by Monday.

MR. WEISSBURG: May I know exactly what the question is, your Honor?

THE COURT: The question is, and I have absolutely a good reason for asking such a question in view of the record here, I want to know, assuming that the Supreme Court denies cert., I want to know if Pertamina will now agree to the payment of the judgment, which would mean the release of the funds which are now held to secure that judgment, immediate release.

MR. WEISSBURG: I will present that question to my client and get an answer to the court and Mr. Dugan as soon as I have the answer.

THE COURT: Monday.

MR. WEISSBURG: I will communicate as best I can, your Honor, I will emphasize the urgency of your Honor's instructions.

THE COURT: Right, because even the possibility of further useless litigation is something that I want to be warned of, and I want to know about if it's in the offing, in view of this long record which you are aware of.

MR. WEISSBURG: I understand.

THE COURT: So please have that answer by Monday.

MR. WEISSBURG: I will do my absolute best to have an answer.

THE COURT: All right.

* * * *

APPENDIX 5 — LETTER FROM HENRY WEISBURG OF SHEARMAN & STERLING LLP TO HONORABLE THOMAS P. GRIESA DATED AUGUST 28, 2006

SHEARMAN & STERLING LLP

hweisburg@shearman.com
212-848-4193

August 28, 2006

By Fax and Hand

Hon. Thomas P. Griesa
United States District Court
Southern District of New York
500 Pearl Street
New York, New York 10007

Karaha Bodas Company LLC v. Pertamina
(No. 21-MC-00098)

Dear Judge Griesa:

Pursuant to the Court's direction, we are writing to address the question posed by the Court at last Friday's hearing with respect to the payment of the outstanding portion of KBC's judgment by Pertamina. Our understanding of Your Honor's question is whether, in the event that the Supreme Court denies the petitions for certiorari filed by Pertamina and the Ministry of Finance of the Republic of Indonesia, Pertamina will agree to the payment of KBC's judgment. We have been instructed by Pertamina to inform the Court and counsel for KBC that, in the event that the Supreme Court denies

the pending petitions, and assuming that the Court issues a turnover order with respect to the restrained funds appropriate in form and amount, Pertamina will not object before this Court to the payment of the judgment.

Respectfully submitted,

s/ Henry Weisburg
Henry Weisburg

cc: Christopher F. Dugan, Esq. (by fax and mail)
James Berger, Esq. (by fax and mail)
Carolyn B. Lamm, Esq. (by fax and mail)

APPENDIX 6 — LETTER FROM MATTHEW D. SLATER OF CLEARY, GOTTLIEB, ET AL, TO HONORABLE THOMAS P. GRIESA DATED APRIL 19, 2004

CLEARY, GOTTLIEB, STEEN & HAMILTON
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-1801
(202) 974-1500

April 19, 2004

VIA FACSIMILE

Hon. Thomas P. Griesa
United States District Court for
the Southern District of New York
500 Pearl Street, Courtroom 26B
New York, New York 10007

Re: Karaha Bodas Company, L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina"), No. 21-MC-00098

Dear Judge Griesa:

I am writing to report on developments relating to the matters discussed during the telephone status conference conducted on April 12, in particular in relation to the Court's request that Pertamina confirm its readiness to pay the judgment in this case.

As I have previously stated in open court, it is Pertamina's policy to observe its legal obligations and international commitments. Its preferred method of dispute resolution is amicable agreement, and it continues to seek a negotiated settlement in this case. Although it believes that the arbitration award is deeply and fundamentally flawed (and an Indonesian court has so held) and that all or most of the funds in the restrained accounts belong to the Ministry, it is mindful that the courts in the United States and Hong Kong thus far have concluded that the award may be enforced, and Pertamina has given careful consideration to this Court's questions about Pertamina's intentions as to payment.

I am pleased to report, therefore, that I am now authorized by Pertamina to advise the Court that Pertamina commits to pay the Texas Judgment in the event that its forthcoming petition for writ of certiorari concerning the Fifth Circuit's decision is denied or otherwise unsuccessful. In return, Pertamina expects that KBC will agree to suspend proceedings concerning the arbitration award in other jurisdictions and, upon payment, that KBC would dismiss all such proceedings with prejudice. Pertamina's commitment is without prejudice to its firm position as to the flaws in the arbitration award and as to ownership of the restrained funds, but rather is undertaken to bring this dispute to a conclusion upon a final and unreviewable determination that the arbitration award is enforceable in the United States.

Based on Pertamina's commitment to pay the judgment without regard to ownership of the funds subject to restraint, the litigation before this Court can be suspended, and there is no need for the Rule 30(b)(6) deposition, as both the Court and KBC acknowledged during the April 12 conference. Accordingly, we respectfully request that the Court vacate or stay its discovery order entered April 15, 2004.

Respectfully,

s/ Matthew D. Slater
Matthew D. Slater

cc: Christopher F. Dugan
Carolyn B. Lamm

APPENDIX 7 — EXCERPTS OF TRANSCRIPT OF S.D.N.Y. PROCEEDINGS DATED OCTOBER 5, 2004

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

21 MC 98 (TPG)

KARAHA BODAS CO., L. L. C.,

Plaintiff,

v.

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA (Pertamina),

Defendant.

October 5, 2004
10:10 a.m.

Before:

HON. THOMAS P. GRIESA

District Judge

THE CLERK: In the matter of an arbitration between Karaha Bodas Company v. Pertamina.

THE COURT: We are here to deal with the so-called unadjudicated accounts?

MR. DUGAN: Your Honor, there has been a significant development in the case that I would like to go to first if I could.

THE COURT: Yes.

MR. DUGAN: If you recall, last spring, Pertamina made a commitment to pay the entire judgment if certiorari to the supreme court from the Fifth Circuit with regard to the underlying arbitration award was denied. Yesterday, certiorari was denied. And they made this commitment to end this litigation upon that event happening. And we would like to hold Pertamina to that commitment, to that promise, and see if they can be persuaded to release the funds that are held in New York today, so that we can end this hearing. They made a firm commitment. I would like to, if I could, just bring the letter to your attention in which they made this firm commitment. We believe they should be bound to that commitment and they should end this case today.

THE COURT: I agree. What about it?

MR. SLATER: Your Honor, Matthew Slater for Pertamina. I regret that unfortunately I cannot effectuate that today and I cannot rely on the letter that —

THE COURT: Did you find out that cert was denied?

MR. SLATER: Yes.

THE COURT: Did you communicate with your client?

MR. SLATER: With one of the representatives of the client, yes, your Honor.

THE COURT: And did you ask them about your commitment?

MR. SLATER: I've been inquiring about this commitment, your Honor, for a number of weeks, because there have been statements made in the press of which Mr. Dugan is aware and has inquired into as well to the effect that Pertamina is not able to follow through on this.

THE COURT: It is certainly able because there is money in New York held.

MR. SLATER: Your Honor, may I explain what Pertamina has explained to me? There have been other developments in Indonesia with respect to the criminal investigation that has taken place with respect —

THE COURT: There is a lawful judgment which is final. There is an indebtedness. It is open and shut. And there was a commitment.

* * * *

APPENDIX 8 — EXCERPTS OF UNOFFICIAL TRANSCRIPT OF SECOND CIRCUIT PROCEEDINGS DATED MAY 21, 2007

* * *

JUDGE CABRANES: Well, if it is, I just want to place everyone on notice that the clerk's office of the Court of Appeals should be advised that it is related to this case and, therefore, that any appeal of that order would go to this panel, and we'd want to know about that as soon as it happens so that an appropriate scheduling order can be set forth in it so that we can act in some way that's compatible with whatever is happening in this case. I hope that's understood by all concerned. It is so ordered. Let me pursue this matter again of the district court order or the antecedent events, because it is part of this case. It antedates the Court's order which is at issue here. Judge Griesa asked your client shortly before the Supreme Court was to rule on your client's cert petition whether it would agree to release to KBC the funds that the district court had ordered turned over, right?

MR. SINGER: I believe that's —

JUDGE CABRANES: Judge Griesa asked that question, and your client, through counsel, told the district court by letter dated August 28th, 2006, that it would, quote, "not object before this Court to payment of the judgment," correct?

MR. SINGER: That's correct.

JUDGE CABRANES: You didn't write that letter?

MR. SINGER: I didn't.

JUDGE CABRANES: Your firm was not then representing Pertamina?

MR. SINGER: That's correct. We've become involved for the appeal.

JUDGE CABRANES: Counsel at that time was Shearman & Sterling?

MR. SINGER: That's correct.

JUDGE CABRANES: Are counsel for Shearman and Sterling present in this room?

MR. SINGER: Yes, Your Honor.

JUDGE CABRANES: Maybe we could have — could you identify them for the proverbial record?

MR. SINGER: Your Honor, Mr. Weisberg is here.

JUDGE CABRANES: All right. So it was he who wrote that letter, right?

MR. SINGER: Yes, Your Honor, but I'm certainly prepared to discuss it and address it.

JUDGE CABRANES: Yes. Well, we want you to discuss it. At the time that Shearman and Sterling wrote that letter, your client was planning to initiate an action in the Cayman Islands, right?

MR. SINGER: I don't believe so, Your Honor. There's no evidence in the record to show that. The only evidence in the record that the judge below relied upon, to my knowledge, is the timing of the events. The letter came on August the 28th. The Cayman Islands action was filed over two weeks later, on September the 16th — September the 15th. Complaints have certainly been drafted more quickly than that, and there was no evidence to suggest —

JUDGE CABRANES: Well, you could draft them right away, but you usually give it more consideration those two weeks embracing the Labor Day Weekend, you know?

MR. SINGER: Sometimes yes, sometimes no, Your Honor.

JUDGE CABRANES: Sometimes no?

MR. SINGER: But there's nothing in the record to support the assertion that Pertamina was planning a Cayman action, knew that it would bring a Cayman action as of August 18th. And the letter doesn't state one way or the other whether a Cayman action would be brought. What it says is —

JUDGE CABRANES: And you think — and you're prepared to make the argument that this very clever formulation in the letter was a complete coincidence, I suppose. Quote, "not a — it would not object — Pertamina would not object before this Court to payment of the judgment." By happy coincidence, that locution two weeks later becomes the basis of your argument here that there was no connection between these two, yes?

MR. SINGER: Your Honor, Pertamina didn't apply in any court for relief from payment of the judgment. What Pertamina asked for in the Cayman Islands was a mareva injunction —

JUDGE BERMAN: Was what?

MR. SINGER: Was a so-called "mareva" injunction —

JUDGE BERMAN: Yes.

MR. SINGER: — asking KBC to hold the money once it was paid to it. So Pertamina paid the judgment to KBC. The Cayman action was an attempt to get KBC to keep the money to secure it for a potential judgment in the Cayman actions, which is a common device in foreign courts. It's not so common in the United States, but it's not uncommon in the Cayman Islands.

JUDGE BERMAN: And you're telling us that your client didn't know at the time of this August 28 letter — at the time that Shearman & Sterling was writing that

letter that it, Pertamina, had no intention of actually acquiescing to the district court's judgment and letting the funds pass free and clear to KBC?

MR. SINGER: I'm not sure, Your Honor, sitting here today what Pertamina knew. I'm not representing that to the Court. What I am saying to the Court —

JUDGE CABRANES: What was the date of your engagement?

MR. SINGER: On this appeal we were engaged —

JUDGE CABRANES: Well, by Pertamina with respect to this, quote, "matter," unquote.

MR. SINGER: It was sometime last year. I don't know the exact date.

JUDGE CABRANES: Well, maybe you can let us know in due course by letter. Just file with the clerk's office. Give us the date of your engagement.

MR. SINGER: Of our engagement by Pertamina.

JUDGE CABRANES: Right, by Pertamina.

MR. SINGER: I mean, Your Honor —

JUDGE CABRANES: I mean because obviously —

MR. SINGER: — I can tell you Your Honor — if this is the gist of the question, I can tell the Court that it was — I mean it would have been prior to August 28th.

JUDGE CABRANES: Prior to August 28?

MR. SINGER: Yes.

JUDGE CABRANES: Well, it'd be nice to have it on the record exactly when. So prior to August 28, you consulted with Sherman & Sterling with respect to the preparation of this letter?

MR. SINGER: No, Your Honor, we had nothing to do with the preparation of this letter. We were — were not consulted about the letter.

JUDGE CABRANES: It just happened. Even though you're involved in this, quote, "matter," unquote, there are lawsuits all over the place, this is the most important one because this is where all the money is at this point, and you weren't consulted?

MR. SINGER: We were not, Your Honor, I can assure you.

JUDGE CABRANES: And when did you learn about it?

MR. SINGER: I learned about it sometime after the letter was sent. I was not counsel of record in district court.

JUDGE CABRANES: No. I understand.

MR. SINGER: I did not participate in the district court proceedings.

JUDGE CABRANES: No. I'm asking. I'm just trying to get — I'm just trying to understand since there are two law firms here and so whatever fault, if there is fault, in the preparation of this very clever letter of August 28th would lie elsewhere than Williams & Connolly?

MR. SINGER: Your Honor, I don't believe it lies with any lawyer for Pertamina. Mr. Weisburg represented to the district court, and it's on page that he did not know that a Cayman action or any action was planned at the time that he wrote the letter. So I don't think the letter can be blamed on Shearman & Sterling. I don't think the letter —

JUDGE CABRANES: Why would anyone use this curious locution before this Court if i wasn't to try to be evasive with respect to something that would transpire later?

MR. SINGER: Your Honor, the question from the Court, I believe that Mr. Weisburg asked the Court to clarify, and it's in the transcript that Mr. Weisburg asked the Court to clarify exactly —

JUDGE CABRANES: I mean wouldn't the normally English language statement that if you

intended to simply acquiesce to the district court's judgment and let the funds pass free and clear to KBC, you would have said something roughly like that. You wouldn't have seized upon this clever locution "not object before this Court the payment of the judgment."

MR. SINGER: I don't know, Your Honor.

JUDGE CABRANES: You don't know that. I don't know. It certainly looks curious at a minimum, perhaps even apparent that Pertamina is trying to evade the jurisdiction of the district court and to effectively to be free to move this dispute to yet another forum.

* * * *

APPENDIX 9 — DECISION FROM THE GRAND COURT OF THE CAYMAN ISLANDS MADE ON OCTOBER 11, 2007

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 386 OF 2006

BETWEEN:

PT PERTAMINA (PERSERO)

Plaintiff

AND

KARAHA BODAS COMPANY, LLC

Defendant

Foster J.

Note re Orders made on 11th October 2007

This a brief note concerning the orders I am about to make for the assistance of counsel. It is not and is not intended to be a fully reasoned judgment and should not be treated as such.

There are two applications before me. An application by the plaintiff (Pertamina) to dismiss this action "with prejudice" pursuant to an order and judgment of the US District Court for the Southern District of New York ("the US District Court"), as affirmed by the US Court

of Appeals for the Second Circuit ("the US Court of Appeals"). Secondly, the defendant (KBC) has applied for an order for its costs of the action on the indemnity basis.

Pertamina's application to dismiss the action was not opposed. However, the expression "with prejudice" is not a term of art in this Court and is not used in Cayman Islands law, practice or procedure. However, the parties both submitted that the expression is intended to mean that the action should be dismissed on terms that the plaintiff is prohibited from bringing fresh proceedings against the defendant in relation to the same matters. Pertamina's counsel, however, informed me that Pertamina is appealing against the order of the US Court of Appeals to the US Supreme Court and that accordingly it was possible that the present US Court orders requiring Pertamina to dismiss this action could be overturned. Counsel for KBC was not aware whether a substantive appeal to the US Supreme Court had been filed, although he was aware, as appears in the materials before me at this hearing, that Pertamina had made an application to the US Supreme Court for a stay of the order of the US Court of Appeals pending an appeal, which had been rejected by the US Supreme Court.

In the circumstances, I will order that the action be dismissed on terms that Pertamina is prohibited from bringing any further or other proceedings against KBC in this Court based on the same or substantially the same causes of action or seeking the same or substantially the same relief without the leave of this Court.

This leaves the issue of costs. In circumstances where a plaintiff voluntarily discontinues its action, as is the case here, the defendant would usually have its costs of the action and I will so order in this case. The issue remains as to the basis on which those costs should be taxed and KBC seeks an order that its costs of the action should be taxed on the indemnity basis pursuant to GCR 0.62, r.4(11) (r.4(11)). That provides that the court "may make an inter parties order for costs to be taxed on the indemnity basis only if it is satisfied that the paying party has conducted the proceedings, or that part of the proceedings to which the order relates, improperly, unreasonably or negligently".

KBC submitted that in the circumstances here and the background as set out in the judgments of the US District Court and the subsequent judgment of the US Court of Appeals, as well as in the recent judgment of the Court of Appeal of Hong Kong, and in the affidavits of Christopher Dugan, Christopher Easdon (two affidavits) and the relevant exhibits (all of which I have read), this was clearly a case in which in bringing and pursuing these proceedings Pertamina acted improperly and unreasonably (the parties agreed that there was no question in this case of negligence). Counsel for Pertamina submitted that the Court may only make such an order for indemnity costs if it is satisfied that Pertamina "has conducted the proceedings" improperly or unreasonably and that there was nothing improper or unreasonable in the way in which the proceedings had been conducted after they had been initiated. He argued that "conducting the proceedings" necessarily meant

that the proceedings had already commenced and that r.4(11) therefore did not contemplate impropriety or unreasonableness in initiating the proceedings but only in their conduct after they had been initiated; once they had become "proceedings".

I was informed that there is no authority on the interpretation of r.4(11) and there is no equivalent provision in the 1999 RSC. The nearest equivalent is GCR 0.62,r.11 which provides for wasted costs orders. However, r.4(11) is not concerned with wasted costs orders; it relates to inter partes costs. It specifically refers to how "the paying party" has conducted the proceedings. In this case the paying party will be Pertamina.

I was also referred to the provisions of the English CPR part 44 as quoted in *Reid Minty v. Taylor* [2002] 2 All ER 150. However, the procedure under the CPR is very different, particularly in relation to the pre-action protocols which they require, which have no equivalent in the GCR. In the circumstances I do not think that reference to the CPR is of much assistance in the interpretation of r.4(11).

In my judgment the interpretation of r.4(11) contended for on behalf of Pertamina is too narrow. The rule refers to the conduct of the proceedings by the paying party and in my view the conduct of the proceedings is a wide enough expression to encompass the steps taken by the party to initiate the proceedings, whether by the issue of a writ or other originating process. In my view an

inter partes award of the costs of the action means the legal costs incurred by the party in whose favour the award is made to his legal counsel (subject to taxation) in respect of the work involved in taking the steps instructed by the party to process the proceedings from start to finish. An award of the costs of an action to a plaintiff would normally include the costs incurred by the plaintiff party to his legal counsel in procuring the issue of the writ by which the proceedings were commenced. Such steps seem to me to be integral to the party's conduct of the proceedings. In my judgment the phrase "conducted the proceedings" in r.4(11) is wide enough to and does encompass the steps taken by the paying party to commence the proceedings by the issue of originating process and it would be surprising if it did not. In my opinion so procuring the commencement of these proceedings was part of its conduct of the proceedings by Pertamina.

Even if I am wrong about that, it seems to me that instructing the subsequent amendment of its writ and the filing and service of a 32 page statement of claim setting out in detail the alleged basis for its purported claims were undoubtedly steps in the conduct of the proceedings by Pertamina. Accordingly, if I am satisfied that Pertamina's conduct in procuring the issue of the writ on 15th September 2006 and in instructing the subsequent filing of its amended writ and its statement of claim was improper or unreasonable in the circumstances, I may in my discretion make an order that KBC's costs of the action be taxed on the indemnity basis.

The background to those proceedings is an arbitration between Pertamina and KBC arising from certain agreements concerning exploitation of geo-thermal energy resources in Indonesia. The disputes between them were the subject of a final arbitral award in favour of KBC made as long ago as December 2000. The jurisdiction governing the arbitration was Switzerland, where Pertamina's attempt to annul the award was rejected in August 2001. There has since followed over the subsequent 6 years a plethora of litigation in various jurisdictions, including Indonesia, Hong Kong, Canada, Texas and, most relevant for this purpose, New York, in which Pertamina has attempted by one means or another to avoid or delay due enforcement of the arbitral award. The courts of New York have been dealing with such enforcement issues since 2004 because Pertamina has or had substantial funds in certain New York banks.

It has become very clear over several years that Pertamina has been adopting increasingly desperate tactics to avoid or delay its liability under the arbitral award. It is not necessary for me on this application to rehearse the history of this which is fully set out and commented on, in particular in the judgments of the US District Court and of the US Court of Appeals as well as the most recent judgment of the Court of Appeal of Hong Kong and the various affidavits, all of which are before me. Suffice it to say that it is clear to me that Pertamina brought and pursued these proceedings before this Court in a further attempt, not only to avoid or delay its established liability under the arbitral award, (which award clearly had no connection whatever with this

jurisdiction other than the purely incidental fact that KBC is registered as a Cayman Islands company) but also in an attempt to undermine or avoid the consequences of the judgments of various courts worldwide and, most recently, those of the US Federal courts. Pertamina has actively participated in the litigation resulting in all these judgments.

In the proceedings before this Court Pertamina tried, not very subtly it has to said, to seek new relief as a basis for its avoidance tactics namely by claiming damages from KBC in the amount of the arbitral award based on alleged fraud. The same, or at least a very similar, allegation of fraud was also made by Pertamina in the Hong Kong proceedings and has now been very forcefully rejected in critical terms by the Hong Kong Court of Appeal.

For the reasons set out in the US judgments in particular (and most recently in the judgment of the Hong Kong Court of Appeal) I am satisfied that in all the circumstances the description by the New York Court of Pertamina's proceedings before this Court as "an abusive litigation tactic" is entirely justified. It is clear that the proceedings amount in the circumstances to an attempt to use this Court for a collateral purpose, normally an attempt to further delay and avoid the enforcement of the arbitral award made almost 7 years ago. In my view that was improper and unreasonable such an abuse of this Court.

I should add that the public policy of New York referred to in the judgments of the New York Courts of upholding the ultimate purpose and intent behind the New York Convention on the Enforcement of Arbitral Awards is, in my view, also the public policy of the Cayman Islands. The Cayman Islands are a party to the New York Convention and have domestic legislation giving effect to it. It seems to me important that this jurisdiction, particularly as an international financial centre, should have that very same public policy and that this Court should not allow itself to be used for an improper attempt to frustrate the enforcement of a Convention arbitral award with a history like this one. In dismissing Pertamina's claim the Hong Kong Court of Appeal said in its judgment of 9th October 2007 "this is a paradigm example of what should not occur in the context of enforcement of Convention awards"; this applies in my view equally, indeed even more so, to the proceedings before this Court. In my judgment these proceedings were improperly and unreasonably brought and maintained by Pertamina and amount to an abuse of this Court.

Having regard to all the circumstances I order that KBC should have its costs of the action to be taxed, if not agreed, on the indemnity basis.

AJEF

APPENDIX 10 — EXCERPTS OF DECISION OF THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION, COURT OF APPEAL DATED OCTOBER 9, 2007

IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL

CIVIL APPEAL NO. 121 OF 2003

(ON APPEAL FROM HCCT NO. 28 OF 2002)

IN THE MATTER OF THE ARBITRATION ORDINANCE (CAP.341)

and

IN THE MATTER OF AN ARBITRATION AWARD DATED 18 DECEMBER 2000 MADE IN AN ARBITRATION

BETWEEN

KARAHA BODAS COMPANY LLC

Plaintiff

and

PERSUSAHAAN PERTAMBANGAN MINYDAK DAN GAS BUMI NEGARA (otherwise known as PERTAMINA)

Defendant

Before: Hon Tang VP, Stone J and Lam J in Court

Dates of Hearing: 11-13 September 2007

Date of Judgment: 9 October 2007

JUDGMENT

130. If and in so far as fraud is to be asserted in this context, in my judgment the allegation should not only be specifically identified/particularized, in accordance with accepted principle, but that the allegation should emerge from the papers with a degree of clarity such that, if not actually 'leaping off the page', nevertheless the court should be left in little doubt, on the evidence placed before it, that there is a cogent and realistic case of fraud which requires to be ventilated and met.

131. In this context Mr Yu SC did, I think, accept in the course of debate between Bench and Bar that he would be equally happy with the *Saudi Eagle* rubric of "a real prospect of success", and in this I respectfully agree with the view of Tang VP that this is the criterion which should be applied in this context.

132. In my judgment this is the minimum standard so required, and unless it can responsibly be asserted by counsel that an allegation of fraud can be demonstrated to this level, it should not be canvassed or otherwise raised before the Hong Kong court in an effort to prevent enforcement of a Convention award.

133. Which brings me to the second question: on the present evidence before this court, was the appellant able to satisfy the court to the requisite level?

134. In this I entirely agree with the conclusion of the Vice-President; so far as I was concerned the material variously prayed in aid in support of this plea did not achieve the level of a '*prima facie* case', much less the standard of a 'reasonable prospect of success'.

135. In order to advance his argument, Mr Yu SC was constrained to delve into the minutiae of the case, via the recently discovered documentation, and to attempt to demonstrate, by means of inference and circumstantial extrapolation, that officers of KBC had been guilty of *suppressio veri*, and that they had knowingly and dishonestly had failed to reveal their true belief in the existence of the projected geothermal resources.

136. To say that he manifestly failed in this endeavour is not to be critical of his efforts so to persuade; it is perhaps fair to say that it was only Mr Yu's considerable forensic skill that was able to invest this argument with any degree of respectability.

137. For my part he did not come close to establishing the element of dishonesty inherent in the allegation of fraud, nor did I think that the main document upon which ultimately reliance was placed, namely, the December NORC - which, as Mr Jat SC for the respondent pointed out, itself was an extensive (106 page) document which on its face indicated the methodology which was being

adopted, and indicating the uncertainties of the volumetric method, with a whole section (Chapter 6) outlining the uncertainties of this method - was of assistance in terms of the case which was sought to be made out on behalf of Pertamina.

138. In the circumstances I consider that there was ample justification in Mr Jat's further observation that, in addition to the December NORC, the same material was set out in the December NOID, and that in the circumstances the fraud advanced was "the most peculiar fraud" he could imagine, given that it was unclear what his client had suppressed: "We gave them all the data. We told them different methods. On his case, we even told them the criteria . . ."

139. Looking at the case in the round, therefore, as far as I was concerned the fraud allegation as mooted did not get off the ground, and, in company with the Vice-President, I did not consider that the alleged alteration in approach on the part of KBC, as evidenced in the December NORC and NOID, was fraudulent or could be categorized as an intention to mislead. Nor did it avail Mr Yu alternatively to couch his criticism in terms of alleged disingenuity or impropriety or dubious business morality on the part of KBC: either the conduct complained of was fraudulent - which was the case the plaintiff came to meet - or it was not, and in this case he simply was unable to hit his desired target.

140. The issue of fraud undoubtedly constituted the main bridgehead of this appeal. In terms of the other

subsidiary issues raised by Mr Yu SC - the issue of the alleged arbitrariness of the damages award, the allegation that the tribunal had 'rewritten' the contract, and the procedural complaint in terms of the failure of the tribunal to grant an adjournment or discovery - I also agree with the analysis of the Vice-President, and am of the view that there is nothing in any of these points which would justify the court in declining to enforce this arbitral award.

141. I note that of these subsidiary points, only the alleged procedural impropriety on the part of the Tribunal was a point ventilated before Burrell J, whose judgment upon the issue was, if I may say so, impeccable.

142. In my view the course that this case has taken represents a paradigm example of what should *not* occur in the context of enforcement of Convention awards, wherein an alleged case of fraud is used as the 'hook' to reopen argument upon the entire case hitherto the subject of full arbitral consideration. In opening this appeal Mr Yu had noted that Pertamina anxiously had been awaiting its 'day in court', but for my part I regret to say that I consider this appeal to have been singularly lacking in merit.

Hon Lam J:

143. I have the advantage of reading the judgments of the Vice-President and Stone J in draft. I respectfully agree with them and for the reasons given therein, the

appeal must fail. I only wish to highlight that this is an appeal from a decision to enforce an international arbitral award. The Vice-President and Stone J have discussed at length the benchmark required for resisting enforcement on the ground of fraud. I agree with them that the *Saudi Eagle* threshold must be satisfied before the enforcing court should pay any heed to such contention. Once the threshold is satisfied, the enforcing court will probably have to hear the evidence on the allegation of fraud and make findings on the same. Whether the award should be enforced will then depend upon such findings.

144. That is the position regarding an allegation of fraud being raised at the first instance court when a respondent seeks to resist the enforcement of an international arbitral award.

* * *

152. In these cases, the fraud in question was fraud in terms of false evidence adduced at the court below. In contrast, in this appeal, the alleged fraud was fraud practiced on Pertamina when the December NOID and NORC were issued.

153. What can be derived from these cases is that when there is clear evidence of a judgment being obtained by fraud (in that conditions 2 and 3 of *Ladd v Marshall* are met), the court will apply condition 1 with flexibility to avoid any miscarriage of justice. An allegation of fraud *per se* is neither here nor there, much depends on the strength of the case as to fraud and its relevance.

154. In the present case, for the reasons given by the Vice-President, I do not think Pertamina comes anywhere near to establishing that the new evidence would have an important influence on the outcome of the arbitration. Further, I do not think they show any fraud practised by KBC at the court below or for that matter, at the arbitration proceedings.

* * * *

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No. 07-619

IN THE

Supreme Court of the United States

PT PERTAMINA (PERSERO),
Petitioner,

v.

KARAHA BODAS COMPANY, L.L.C.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

HENRY WEISBURG
SHEARMAN & STERLING LLP
599 Lexington Avenue
New York, NY 10022
(212) 848-4000

DAVID E. KENDALL
CRAIG D. SINGER
Counsel of Record
THOMAS J. ROBERTS
KATHERINE M. TURNER
JOHN S. WILLIAMS
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, NW
Washington, DC 20005
(202) 434-5000

Attorneys for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTRODUCTION

The Brief for the United States as Amicus Curiae (the "Government Brief") recommends that the Petition be denied because, in the government's view, the Second Circuit's decision is correct and presents no significant circuit conflict. While Pertamina appreciates the government's efforts in expressing its views to the Court, we disagree strongly with its conclusions.

Most notably, the Government Brief does not appear to confront the principal substantive policy issues such injunctions pose for the United States: the international comity concerns and international treaty obligations to which the Second Circuit's decision gives short shrift. The government nowhere addresses the international policy ramifications inherent in the standards for issuing foreign anti-suit injunctions, a question that has divided nine federal circuits. The intrusion on international comity is manifest in this case, where U.S. courts effectively have blocked the courts of the Cayman Islands – and indeed "any court or tribunal" – from hearing Pertamina's lawsuit for fraud, in an international dispute with minimal connection to the United States. Pet. App. 43a.

Nor does the Government Brief confront the significant international law ramifications of the Second Circuit's treatment of the New York Convention. Anti-suit injunctions are anathema to the Convention's program of mutual self-restraint in international arbitration proceedings, in which the

courts of many countries may have overlapping involvement.

These are issues on which the United States' views might have been of use to the Court, but its brief does not address them. Rather, the Government Brief takes a far narrower and, we submit, a far less helpful approach. It merely opines (incorrectly) on the merits of this dispute and applies a crabbed reading of the caselaw to question the materiality of circuit conflicts that are plain to see.

1. The government concedes at least a "potential conflict" between the Second and Eighth Circuits on the question whether a federal court has ancillary jurisdiction to issue a foreign anti-suit injunction after satisfaction of a money judgment, but it characterizes the conflict as "narrow" and "of recent vintage." Gov't Br. 15, 16. On the contrary, the conflict is clear, and it raises an important issue of ancillary jurisdiction that displays the circuit courts' confusion in applying this Court's recent precedents in light of its nineteenth-century predecessors.

2. The government finds the issue of a New York Convention secondary tribunal's authority to issue a foreign anti-suit injunction not to warrant review because the identified conflict involves only two circuits, within the same litigation, and because the Second Circuit "plausibly distinguished" the Fifth Circuit's decision. Gov't Br. 10. On the contrary, the Second Circuit's proffered distinctions are neither correct nor plausible, and the conflict between the circuits implicates a highly significant issue

concerning a court's power under an international treaty.

3. The government recognizes the longstanding circuit conflict regarding the standards for issuing a foreign anti-suit injunction but questions whether the conflict is meaningful (it is), and whether it affects the result in this case (it does). On the contrary, the differences among the circuits' approaches are undeniable, and the reasoning the Second Circuit employed in this case contrasts starkly with that of other circuits, under which the injunction should not have issued.

I. THE GOVERNMENT BRIEF ONLY HIGHLIGHTS THE CIRCUIT CONFLICT REGARDING THE SCOPE OF ANCILLARY JURISDICTION AFTER SATISFACTION OF A JUDGMENT.

The government acknowledges that if the Eighth Circuit's decision in *Goss International Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355 (8th Cir. 2007), is read to mean that "a federal court lacks jurisdiction to maintain an antisuit injunction if its judgment awarded only monetary relief and has been fully satisfied," that holding "would conflict with the Second Circuit's decision in this case." Gov't Br. 16. That is exactly what the Eighth Circuit held. In the words of the Second Circuit, "the Eighth Circuit reasoned that, under *Peacock* [*v. Thomas*, 516 U.S. 349 (1996)], the district court retained ancillary enforcement jurisdiction only '*until* satisfaction of the judgment.'" Pet. App. 38a (quoting *Goss*, 491 F.3d at 365). The Second Circuit

took a different approach, "grounded in the concepts of *res judicata* and collateral estoppel," and found ancillary jurisdiction in order to prevent "relitigating issues . . . that were already decided." *Id.*

Far from dispelling the importance of this circuit conflict, the Government Brief in fact highlights the confusion in this area of law, which "can hardly be criticized for being overly rigid or precise." *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 379 (1994). The government relies on *Dietzsch v. Huidekoper*, 103 U.S. 494 (1880), a nineteenth-century decision not cited by the Second or Eighth Circuits, which the government invokes for the broad proposition that a federal court has jurisdiction, even after judgment, to ensure that the victorious party retains "'the substantial fruits of [that] judgment.'" *See* Gov't Br. 10-13 (quoting *Dietzsch*, 103 U.S. at 498).

The Government reads too much from *Dietzsch*'s sweeping pronouncement. This Court in *Kokkonen* rejected similar "expansive language" from a turn-of-the-last-century case as "inaccurate" when a litigant argued for ancillary jurisdiction "'to obtain and secure the fruits, benefits and advantages of the proceedings and judgment in a former suit in the same court.'" 511 U.S. at 379 (quoting *Julian v. Central Trust Co.*, 193 U.S. 93, 113-14 (1904)). And, even though allowing a judgment creditor to collect against an officer of the debtor who had transferred assets to himself surely would have helped the judgment creditor "secure or preserve the fruits . . . of a judgment," Gov't Br. 12 (citation and emphasis omitted), this Court in *Peacock* did not hesitate to

find that there was no ancillary jurisdiction over such an action. 516 U.S. at 356-59.

The holding of *Dietzsch* is "not remotely as permissive as its language." *Kokkonen*, 511 U.S. at 379. In *Dietzsch*, a replevin action had been removed to federal court resulting in a judgment that plaintiffs were entitled to the "goods and chattels" in question. *Kern v. Huidekoper*, 103 U.S. 485, 489 (1880). While the state court action proceeded to judgment in favor of the opposing party, this Court determined that the valid removal left the competing state court "without any case." *Id.* at 491. When defendants attempted to sue on the replevin bond in state court, the *Dietzsch* Court viewed their lawsuit as an attempt to "wrest[] the replevied property from the plaintiffs" based on a "pretended judgment of the State court, rendered in a case over which it had no jurisdiction." 103 U.S. at 497. Thus the ancillary jurisdiction exercised in *Dietzsch* flowed from the federal court's need to "vindicate its authority" over an obstreperous state court,[1] as well as the need to "effectuate" its ongoing decree regarding ownership of a specific *res*. *Kokkonen*, 511 U.S. at 380.

In contrast, the decision below is irreconcilable with *Peacock* or *Kokkonen*. The court's judgment was "finally satisfie[d]" prior to the anti-suit injunction. Pet. App. 63a. The district court's continued

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[1] In *Pacific Railroad v. Missouri Pacific Railway Co.*, 111 U.S. 505 (1884), it was alleged that the judgment had been procured by fraud, *id.* at 506, thus making the exercise of jurisdiction an example of a federal court vindicating its authority. *See also United States v. Beggerly*, 524 U.S. 38, 45-46 (1998) (discussing *Pacific Railroad*).

jurisdiction thus was not needed "to execute, or to guarantee eventual executability of, a federal judgment." *Peacock*, 516 U.S. at 357. Though Pertamina's foreign lawsuit "sought damages in the amount of the [arbitration award]," Pet. App. 12a, jurisdiction to stop the suit was "quite remote from what courts require in order to perform their functions." *Kokkonen*, 511 U.S. at 380.

II. THE SECOND AND FIFTH CIRCUIT DECISIONS ARE IRRECONCILABLE REGARDING THE PROPRIETY OF ANTI-SUIT INJUNCTIONS UNDER THE NEW YORK CONVENTION.

The Second and Fifth Circuits reached opposite results, by applying inconsistent reasoning, in addressing the role of U.S. courts in considering anti-suit injunctions as secondary tribunals under the New York Convention. The Fifth Circuit overturned an injunction based on the limited role of a court of secondary jurisdiction under the Convention. Pet. App. 172a-177a. It found that a decision confirming an arbitration award is "not truly a decision on the merits" and "is not necessarily given *res judicata* effect in foreign jurisdictions," *id.* at 184a, and that the United States has a much less significant interest in such a decision, *id.* at 187a. The Fifth Circuit's logic cannot be squared with the Second Circuit's decision, which treated the confirmation and turnover awards as "federal judgments" on par with merits decisions and ignored the Convention's policy of mutual self-restraint.

The Government Brief hardly alludes to these fundamental Convention concerns and thus renders the Fifth Circuit's decision unrecognizable. *See* Gov't Br. 3-4. Instead, it endorses the Second Circuit's attempt to distinguish the Fifth Circuit case on the basis of an insignificant difference in its procedural posture. *Id.* at 18. It is true that while the injunction issued by the Texas district court followed an order confirming the arbitral award, the injunction issued by the New York court followed the turnover of funds pursuant to the same confirmed award. But the entire purpose of the enforcement proceedings in Texas was to obtain funds to satisfy the arbitral award. Indeed, by the time of the Fifth Circuit decision in 2003, the award had been confirmed and the Texas district court had granted KBC leave to register the judgment in other states. Pet. App. 160a.

In concluding that the district court could enforce the award notwithstanding the Indonesian action, the Fifth Circuit – contrary to the Government Brief (at pp. 17-18) – was *not* concerned about the financial hardship the Indonesian court might impose. The Fifth Circuit was skeptical whether the hardship would materialize. But the court recognized that "Pertamina could have sought monetary relief in the Indonesian courts . . . and Indonesian courts, if truly determined to protect Pertamina at any cost, likely would have been willing to grant the relief requested." Pet. App. 178a. In other words, the Fifth Circuit would have reversed the injunction even in the face of a damages award from the Indonesian court.

The government also contends that the Fifth Circuit took account of the "colorable argument" that Indonesia was a court of primary jurisdiction. Gov't Br. 18. While the Fifth Circuit considered this hypothetical, it did not affect the court's decision. To the contrary, the Fifth Circuit was clear that "legal action in Indonesia, *regardless of its legitimacy*, does not interfere with the ability of U.S. courts . . . to enforce a foreign arbitral award." Pet. App. 184a (emphasis added).

The government finally argues that the injunction is proper because the "Convention strongly favors the use of arbitration as a means to settle disputes." Gov't Br. 15. The question here is not the merits of arbitration but whether an arbitral award precludes a foreign action. The Convention does not mandate that questions of res judicata be arbitrated – much less that a court of secondary jurisdiction should deprive foreign courts of the ability to decide such questions.

The Second Circuit decision encourages parties who prevail in foreign arbitration to initiate enforcement proceedings in the United States and, if successful, to seek an anti-suit injunction barring further actions that might implicate the funds they obtain. This result runs directly contrary to the Fifth Circuit's view that as courts of secondary jurisdiction, "the authority of U.S. courts is restricted to enforcing or refusing to enforce the arbitral award under the Convention." Pet. App. 180a-181a. The Second Circuit's holding therefore threatens to undermine the regime of self-restraint that sustains

the Convention. This case merits this Court's review.

III. THE GOVERNMENT UNDERSTATES THE SIGNIFICANCE OF THE NINE-CIRCUIT SPLIT REGARDING THE STANDARD FOR ISSUING ANTI-SUIT INJUNCTIONS.

The government contends that the widely recognized circuit split regarding the standard for anti-suit injunctions is little more than a verbal disagreement not worthy of this Court's attention. To the contrary, that split produces disparate outcomes dependent on the circuit in which a case is adjudicated. Courts struggling to resolve these complicated cases face a challenge made "particularly formidable given the absence of guidance from the Supreme Court . . . [regarding] the criteria for granting an international antisuit injunction." *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 16 (1st Cir. 2004).

The government cites isolated cases in which courts applying a permissive standard suggested that an anti-suit injunction also would be appropriate under a stricter standard. Gov't Br. 18-19. But the relevant question is whether there are cases in which an anti-suit injunction would be deemed appropriate under certain standards, but not others. There are. *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349 (6th Cir. 1992), most clearly articulates the strictest approach, which is applied by the Sixth, Third, and Eighth Circuits. Applying

that standard to cases from circuits permitting anti-suit injunctions on the basis of equitable factors would produce markedly different results. In *Seattle Totems Hockey Club, Inc. v. National Hockey League*, 652 F.2d 852 (9th Cir. 1981), for example, the Ninth Circuit affirmed an anti-suit injunction based on its conclusion that two separate actions would be "likely to result in unnecessary delay and substantial inconvenience and expense." *Id.* at 856. Similar equitable concerns sufficed to justify an anti-suit injunction in *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 627 (5th Cir. 1996). There was no finding in these cases that the parallel foreign litigation threatened the court's jurisdiction or an important public policy, and on the facts of those cases, no such threats existed – particularly as the conservative circuits narrowly construe them (*see infra*, pp. 11-12). Had these cases been decided in the strictest circuits, which hold that those two factors are the *only* relevant considerations, *see* Pet. 33, the courts would have been constrained to deny the anti-suit injunctions.

Conversely, had the movant in *Gau Shan* brought its case in any of the circuits that permit consideration of equitable factors – as the Second Circuit did in this case – its argument that an anti-suit injunction was "justified in order to prevent vexatious litigation in Hong Kong," 956 F.2d at 1355, might well have supported an injunction. In fact, the district court in *Gau Shan* so held. *Id.* at 1354-55.

The above cases illustrate that the standard can and does determine whether an anti-suit injunction will survive scrutiny. And indeed, the standard was

determinative in this case. The government's contrary argument, *see* Gov't Br. 21-22, ignores that the Second Circuit erroneously applied the threat-to-jurisdiction and public policy factors in a broad manner that stricter circuits reject. The Second Circuit found interference with jurisdiction from a foreign action that sought to recover the same amount of funds previously awarded by a U.S. court – after the U.S. proceeding was concluded and the judgment fully satisfied. That approach to the threat-to-jurisdiction factor is significantly more expansive than the approach that the Sixth and Eighth Circuits employ. In *Gau Shan*, the Sixth Circuit noted that "only two scenarios . . . have been held to threaten a court's jurisdiction": where the concurrent proceeding interferes with an *in rem* or *quasi in rem* matter, or attempts to carve out exclusive jurisdiction over an action. 956 F.2d at 1356.

The Eighth Circuit in *Goss* similarly found that the foreign action did not pose a threat of "*interdictory* jurisdiction" because the district court action had concluded. 491 F.3d at 365 (emphasis added). The same is true here. Pertamina's action in the Cayman Islands did not preclude the district court's exercise of its jurisdiction. Had the Second Circuit applied a similarly narrow conception of the threat-to-jurisdiction factor, it could not have affirmed the anti-suit injunction on that basis.

The Second Circuit also erred when it found that a public policy favoring international arbitration justified the anti-suit injunction. Pet. App. 32a. The Sixth Circuit in *Gau Shan* emphasized that public

policy concerns may bar foreign litigation only where the foreign proceedings are "repugnant to fundamental notions of what is decent and just." 956 F.2d at 1358 (internal quotation marks omitted); *accord Stonington Partners, Inc. v. Lernout & Hauspie Speech Prods. N.V.*, 310 F.3d 118, 127 (3d Cir. 2002) (public policy factor has been "narrowly drawn"). Moreover, there is no basis to suggest that foreign courts would not respect principles favoring arbitration in determining whether Pertamina's fraud action was adjudicable.

This case presents an excellent opportunity for the Court to resolve the pervasive circuit conflict and articulate a coherent standard. As the First Circuit observed, the global economy "depends on cooperation, reciprocity, and respect among foreign nations." *Quaak*, 361 F.3d at 19. There is "enduring need" for a standard that gives due weight to international comity. *Id.* A clear ruling limiting anti-suit injunctions to genuine threats to a U.S. court's jurisdiction or vital domestic policies would signal U.S. courts' respect for foreign tribunals, and would encourage those courts to extend a like regard for the jurisdiction of the U.S. courts.

IV. THIS PETITION PRESENTS THE BEST VEHICLE FOR CERTIORARI.

The government finally suggests, again incorrectly, that *Goss* may present a better vehicle for certiorari than this case. Brief for the U.S. as Amicus Curiae, No. 07-618, 22 n.5. On the contrary, only the *Pertamina* matter presents the Court with an opportunity to consider the international treaty

implications of anti-suit injunctions under the New York Convention. In contrast, *Goss* implicates a statute that has been repealed by Congress. Also, the Second Circuit's decision below is incorrect. While both cases are cert-worthy, if the Court elects to review only one, it should be this one.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

DAVID E. KENDALL
CRAIG D. SINGER
Counsel of Record
THOMAS J. ROBERTS
KATHERINE M. TURNER
JOHN S. WILLIAMS
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, NW
Washington, DC 20005
(202) 434-5000

HENRY WEISBURG
SHEARMAN & STERLING LLP
599 Lexington Avenue
New York, NY 10022
(212) 848-4000

Attorneys for Petitioner

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

HENRY WEISBURG
SHEARMAN & STERLING LLP
599 Lexington Avenue
New York, NY 10022
(212) 848-4000

DAVID E. KENDALL
CRAIG D. SINGER
Counsel of Record
THOMAS J. ROBERTS
KATHERINE M. TURNER
JOHN S. WILLIAMS
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, NW
Washington, DC 20005
(202) 434-5000

Attorneys for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTRODUCTION

The Petition describes three separate substantial circuit splits. The Brief in Opposition concedes one "deep" and "longstanding" split, Opp'n 20; disputes another based on alleged factual differences that were not material to the circuits' decisions, Opp'n 36-38; and essentially ignores the third, Opp'n 8 n.10. In fact, all three of the Questions Presented identify direct and significant conflicts in the circuits, any one of which merits certiorari.

Of the three significant circuit splits presented in the Petition, two implicate the Eighth Circuit's decision in *Goss International Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355 (8th Cir. 2007). A petition for certiorari was filed in *Goss* on October 15, 2007, and the response date is extended to January 9, 2008. Because of the issues in common between the two petitions, the Court may wish to consider them at the same time. The Court should grant certiorari in this case, however, whatever its disposition of *Goss*.

I. A DIRECT AND SUBSTANTIAL CIRCUIT SPLIT EXISTS REGARDING FEDERAL COURTS' ANCILLARY JURISDICTION FOLLOWING SATISFACTION OF A JUDGMENT.

KBC contends that the Second and Eighth Circuits are not in conflict on the issue of a federal court's ancillary jurisdiction to enjoin foreign proceedings following satisfaction of a damages judgment. KBC is at pains to justify this position,

given that the two courts reached opposite conclusions on that precise issue. The Second Circuit, in addressing *Goss*, did not even seek to distinguish that case; it expressly disagreed with it. *See* Pet. App. 37a-40a.

While KBC now identifies purported factual differences between the two cases,[1] none of these was determinative of the Eighth Circuit's ruling that jurisdiction was lacking, *see Goss*, 491 F.3d at 365-68, and the Second Circuit never suggested that those factual differences mattered to its decision. On the contrary, the Eighth Circuit held that federal jurisdiction to enjoin a foreign lawsuit does not exist after payment of a money judgment, even when the foreign lawsuit allegedly seeks to undo the effect of the U.S. federal court's judgment, *id.* at 365-67; the Second Circuit held the opposite, Pet. App. 38a-40a.

KBC quotes part of a footnote in *Goss* (Opp'n 37), but neglects to quote the preceding sentence; its characterization of the footnote is thus highly misleading. The footnote reads in full:

> We recognize there are cases where the satisfaction of judgment is not, as here, solely the payment of a money judgment. Therefore, we reach no categorical conclusion regarding the propriety of the issuance of an antisuit

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[1] Notably, KBC took the opposite position before the Second Circuit. Prior to the Eighth Circuit's inconvenient reversal of the Iowa district court's ruling, KBC argued that the *Goss* case was "remarkably similar" and "almost identical" to this one. Appellee's Br. 55, 56. *See also id.* at 36.

> injunction in all cases involving the preservation of a judgment.

Goss, 491 F.3d at 368 n.9. Read in its entirety, the *Goss* footnote indisputably means, not that the decision is confined to its facts, but rather that there are some district court judgments that are *not* fully satisfied by the payment of damages.[2] The judgment in this case, as in *Goss*, was not one of those. It was fully satisfied by payment of the turnover award.

KBC further characterizes the circuit split (which it claims does not exist) as a "shallow" one, involving only two circuits. Opp'n 36. But the importance of this issue of federal subject matter jurisdiction cannot be denied, and KBC does not try. Issues significantly implicating the power of federal courts should be resolved at the earliest opportunity. With two circuits at a clear impasse, after lengthy and reasoned opinions, only this Court can clarify the scope of federal court authority to enjoin litigation after satisfaction of a judgment.

While the issue presented here warrants certiorari whatever the Court's ultimate view of the merits may be, in fact *Goss* was correct, and the Second Circuit's decision below was not. *See* Pet. 18-22. KBC's principal argument in response is that *Goss* relies on *Peacock v. Thomas*, 516 U.S. 349 (1996), which allegedly "stands only for the . . .

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[2] It is on precisely this basis that the decisions cited by KBC (Opp'n 35) – *Dietzsch v. Huidekoper*, 103 U.S. 494 (1880), and *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934) – are distinguishable: they involved ongoing orders that needed protection. *See* Pet. 20.

proposition that 'the district court retained ancillary enforcement jurisdiction *until* satisfaction of the judgment.'" Opp'n 38 (quoting *Goss*, 491 F.3d at 365) (emphasis in original). The clear implication of *Peacock*'s statement, however, as *Goss* correctly recognized, is that jurisdiction exists until satisfaction of the judgment – *and not beyond*. While noting that courts have ancillary jurisdiction over proceedings "to assist in the protection and enforcement of federal judgments," 516 U.S. at 356, the Court in *Peacock* emphasized that its "recognition of these supplementary proceedings has not . . . extended beyond attempts to execute, or to guarantee eventual executability of, a federal judgment," *id.* at 357. The present anti-suit injunction lies beyond a mere attempt to execute upon a judgment, and therefore the district court lacked jurisdiction to issue it.

II. A DIRECT AND SUBSTANTIAL CIRCUIT SPLIT EXISTS REGARDING THE PROPRIETY OF FOREIGN ANTI-SUIT INJUNCTIONS BY SECONDARY JURISDICTION COURTS UNDER THE NEW YORK CONVENTION.

The Second Circuit, in direct contrast to the Fifth, erroneously treated the district courts' secondary confirmation and enforcement proceedings under the New York Convention as equivalent to a judgment on the merits by a United States court.

KBC's "response" to this, the second Question Presented in the Petition, is consigned to a footnote in its Counter-Statement of the Facts. Opp'n 8 n.10.

The footnote asserts that the Second and Fifth Circuits' decisions are "factually and legally distinct," because the Cayman Action, a lawsuit for damages and subsidiary injunctive relief, allegedly posed a greater threat to the district court's jurisdiction than the Indonesian annulment action that the Fifth Circuit refused to enjoin.

This proffered distinction in no way resolves the circuit conflict, because the Fifth Circuit's decision did not depend on the remedy sought in the foreign action. Indeed, the Fifth Circuit expressly considered that "Pertamina could have sought monetary relief in the Indonesian courts," but concluded that –

> as a court of secondary jurisdiction under the New York Convention, charged only with enforcing or refusing to enforce a foreign arbitral award, it is not the district court's burden or ours to protect KBC from all the legal hardships it might undergo in a foreign country as a result of this foreign arbitration or the international commercial dispute that spawned it.

Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F.3d 357, 369 (5th Cir. 2003).

The Fifth Circuit thus grounded its decision on the limited role of a court of secondary jurisdiction – "charged only with enforcing or refusing to enforce a foreign arbitral award" – not on the nature of the

remedy sought in the foreign proceeding. *Id.* Indeed, the Fifth Circuit reversed the anti-suit injunction based in part on the "general principle that a sovereign country has the competence to determine its own jurisdiction *and grant the kinds of relief it deems appropriate.*" *Id.* at 372-73 (emphasis added).

A direct circuit split exists, which this Court should resolve, regarding the authority of a court of secondary jurisdiction under the New York Convention to grant a foreign anti-suit injunction.

III. THE SECOND CIRCUIT'S DECISION CONTRIBUTES TO THE WIDELY ACKNOWLEDGED CIRCUIT SPLIT REGARDING THE STANDARD FOR ISSUING ANTI-SUIT INJUNCTIONS.

KBC concedes, as it must, that there is a "deep" and "longstanding" split among the circuits regarding the proper standard for issuing foreign anti-suit injunctions. Opp'n 20, 21. It does not and cannot deny that this Court's review would resolve that conflict and clarify the law throughout the federal courts on an issue fundamental to international comity.

KBC attempts to downplay this clear-cut basis for granting certiorari by arguing that the Second Circuit granted an anti-suit injunction based on "the most restrictive standard," Opp'n 22, and therefore Pertamina could not hope for a more favorable result in this Court. KBC mischaracterizes the circuit split and the Second Circuit's place within it. In any event, the issue is far from academic in this case: in

resolving the differences among the circuits, this Court can and should reverse the Second Circuit's decision below.

The Opposition insists that each circuit falls into one of two neatly divided "binary" camps. Opp'n 21-27. In its zeal to establish that there are two, and only two, standards in use, KBC seeks to impose a uniformity upon the courts' approaches that the case law does not bear out. It thereby ignores the significant – and potentially outcome-determinative – differences even among those circuits whose approach has been called "restrictive." *See* Pet. 32-34.

Indeed, *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11 (1st Cir. 2004), the very case on which KBC relies for its contention that there are only two standards, directly undercuts that contention. *See* Opp'n 24-25. The First Circuit in *Quaak* expressly distanced itself from "the conservative approach," and, in particular, from decisions of the Third and Sixth Circuits, which it found treated preservation of jurisdiction and protection of important national policies "as exclusive," and thereby "evince[d] a certain woodenness." 361 F.3d at 18. The First Circuit thus recognized the very division within the restrictive circuits that KBC now denies, between those circuits that examine equitable considerations in considering anti-suit injunctions, and those circuits that treat interference with jurisdiction or important public policies "as exclusive." *Id.*

The question, in any event, is not whether the First Circuit – or any other circuit – has observed differences between the Second Circuit's approach and that of other circuits, or has characterized those differences as part of a two-way, three-way, or other-way split. The question is whether those differences exist. They do. The Second Circuit relied on equitable factors in issuing the anti-suit injunction, Pet. App. 33a-34a; the Third, Eighth, and Sixth Circuits have not considered such factors, *see, e.g.*, *Goss*, 491 F.3d at 361 n.4; *Stonington Partners, Inc. v. Lernout & Hauspie Speech Prods. N.V.*, 310 F.3d 118, 127-29 (3d Cir. 2002); *Gen. Elec. Co. v. Deutz AG*, 270 F.3d 144, 160-61 (3d Cir. 2001); *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1355 (6th Cir. 1992). Indeed, the Sixth Circuit has stated that interference with jurisdiction or an important policy of the forum are the "only" two factors that may be considered. *Gau Shan*, 956 F.2d at 1355.

Had the Second Circuit adopted that approach, eschewing equitable factors, it could not have relied on "vexatiousness" as a basis for affirming the anti-suit injunction in this case. *See* Pet. App. 33a-34a. The Second Circuit's reliance on equitable factors thus separates it from the more restrictive standard applicable in the Third, Sixth, and Eighth Circuits. On this basis alone, the circuit split is implicated by this case.

Regardless where on the spectrum of restrictiveness the Second Circuit's *China Trade* test may fall, KBC fails to respond to the ways in which the Second Circuit's application of that test conflicts with other circuits' application of the threat-to-

jurisdiction and public policy factors. *See* Pet. 36-38. If certiorari is granted, this Court, in articulating a standard for foreign anti-suit injunctions that resolves the deep split among the circuits, necessarily will address the meaning of these fundamental factors and their application to this case. Review of this Question Presented therefore may – indeed, should – lead to reversal of the anti-suit injunction.

Finally, KBC does not dispute that the Court should resolve the conflict among the circuits with regard to anti-suit injunctions; it merely argues (incorrectly, as discussed above) that this case is not the appropriate vehicle. Accordingly, it suggests that this "longstanding," "deep" circuit split should be left unresolved for another day. KBC puts forth no good reason why this Court should not address this issue, to put an end to the unpredictability in this area of the law and the resulting severe negative consequences for international commerce and comity.

IV. RESPONDENT'S "POLICY" ARGUMENTS ARE NOT WELL TAKEN AND IN ANY EVENT HAVE NO BEARING ON WHETHER THE PETITION SHOULD BE GRANTED.

KBC asserts that "any grant of certiorari by this Court" would undermine "important public policy considerations." Opp'n 28. Such considerations, even if they existed (they do not) are not among the factors pertinent to the decision whether to grant a petition. *See* Sup. Ct. R. 10.

The "policy" concerns KBC highlights are among the same considerations debated in this litigation as potential equitable grounds allegedly relevant to the issuance of an anti-suit injunction. As discussed in Part III, *supra*, the circuits are divided regarding the propriety of considering just such equitable factors; accordingly, it would be most incongruous to deny Pertamina's petition on that basis.

In any event, even were they relevant to the petition, the considerations KBC identifies would not weigh against certiorari. KBC first articulates a federal policy in favor of finality of litigation. Although KBC invoked finality as a reason for the Second Circuit to affirm the anti-suit injunction, the Second Circuit did not rule on that basis. Finality is not an end in itself – there is a "strong presumption in favor of deciding cases on the merits" in federal courts. *Malot v. Dorado Beach Cottages Assocs.*, 478 F.3d 40, 43 (1st Cir. 2007). Indeed, if finality were sufficient reason to deny a petition for certiorari, no petition ever would be granted.

KBC next asserts that Pertamina's fraud claims in the Cayman Action are arbitrable; it thus concludes that this Petition contravenes a federal policy favoring enforcement of arbitration clauses. This issue was not decided below; no court has addressed whether the claims are arbitrable. In any event, the anti-suit injunction KBC now defends prevents Pertamina from seeking arbitration. *See* Pet. App. 43a (enjoining Pertamina "from making a claim or commencing an action in any court *or tribunal*" (emphasis added)). Accordingly, if KBC were correct that the claims are arbitrable, any

policy favoring arbitration clauses would support Pertamina.

KBC's third proposed policy consideration – that federal courts favor the swift resolution of arbitration – also favors Pertamina. As this Court has observed, the success of international arbitration "depends upon the willingness of national courts to let go of matters they normally would think of as their own." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 639 n.21 (1985). The issuance of anti-suit injunctions by U.S. courts signals profound disrespect for the court systems of the other Convention signatories. *See* Brief of Republic of Indonesia as Amicus Curiae in Supp. of Pet. 16-18. The inevitable result is injunctions of federal actions by foreign courts, *see, e.g., Dependable Hwy. Express, Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1067-69 (9th Cir. 2007) (federal action enjoined by English court), which hinder the efficient resolution of arbitrations.

KBC further asks the Court not to grant the petition in light of federal policies against forum shopping or vexatious conduct. If anyone is guilty of forum shopping it is KBC: it initiated proceedings in this case in four countries; Pertamina's Cayman Action is filed in the country where KBC is incorporated; and KBC ran to its preferred New York forum to block that lawsuit.

Nor is the Cayman Action "vexatious." Pertamina filed that lawsuit in KBC's home forum, after KBC had thwarted on procedural grounds Pertamina's attempts to prosecute its fraud allegations in then-

ongoing enforcement actions in Singapore and Hong Kong. *See* Pet. 8-9.[3] Pertamina believes it was defrauded of hundreds of millions of dollars. It understandably desires to redress that injury, and it should not be criticized for its persistence in seeking vindication through the courts.

Finally, KBC recites a litany of alleged litigation abuses by Pertamina. Never mind that it is KBC that stands accused of a nine-figure fraud and seeks to enjoin litigation of that claim; its strategy is to fling allegations, no matter how irrelevant and unseemly they may be in the context of a petition for certiorari. It should suffice in response to say that Pertamina disagrees with KBC's characterizations of its conduct, and that the Second Circuit did not predicate its decision on these allegations.[4]

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[3] Pertamina pursued its fraud claims after it first reviewed, in August 2005, the documents on which they are predicated. *See* Pet. 8. KBC claims that this statement is "demonstrably false" because Pertamina admits that the documents had been sent to it in 2002, *see* Opp'n 5-6 n.5, but Pertamina has submitted evidence showing that it did not review those documents until its new counsel uncovered them in 2005. *See* Pet. 8; *see also, e.g.*, C.A. App. A-1845. KBC may disbelieve that evidence, but the anti-suit injunction has prevented the parties from litigating those facts in the Cayman Islands court.

[4] KBC's principal allegation, *see* Opp'n 13-14, focuses on a letter Pertamina's counsel wrote to the district court, in response to a specific question. Pertamina's August 28, 2006 letter stated that Pertamina would "not object before this Court to the payment of the judgment." The Second Circuit found that this letter was technically accurate, Pet. App. 12a, and did not base its affirmance of the anti-suit injunction in any way on the letter. While the district court evidently believed that Pertamina's letter should have disclosed an intention to file the Cayman Action, the record does not show whether Pertamina in

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

DAVID E. KENDALL
CRAIG D. SINGER
Counsel of Record
THOMAS J. ROBERTS
KATHERINE M. TURNER
JOHN S. WILLIAMS
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000

HENRY WEISBURG
SHEARMAN & STERLING LLP
599 Lexington Avenue
New York, NY 10022
(212) 848-4000

Attorneys for Petitioner

DECEMBER 2007

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fact had such an intention on August 28, over two weeks before it filed the Cayman Action on September 15. *See* Appellant's Br. 56-58. It was this point that counsel for Pertamina addressed at oral argument before the Second Circuit, in the exchange from which KBC quotes only a small excerpt (Opp'n 14-15 n.20). *See* Opp'n App. 99a-106a.

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No. 07-619

IN THE

Supreme Court of the United States

PT PERTAMINA (PERSERO),
Petitioner,
v.
KARAHA BODAS COMPANY, L.L.C.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF THE REPUBLIC OF INDONESIA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Carolyn B. Lamm*
Frank Panopoulos
Dana E. Foster
WHITE & CASE LLP
701 Thirteenth Street, N.W.
Washington, DC 20005
(202) 626-3600
Counsel for the Republic of Indonesia

*Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, the Republic of Indonesia ("Republic") requests leave to file the accompanying *amicus curiae* brief. This brief is submitted in support of the petition for writ of certiorari to the U.S. Court of Appeals for the Second Circuit. Petitioner PT Pertamina (Persero) ("Pertamina") consents to the filing of this brief. Respondent Karaha Bodas Company, L.L.C. ("KBC") does not consent. Counsel of record for both Petitioner and Respondent received timely notice of the Republic's intent to file an *amicus* brief.[1]

[1] The petition for a writ of certiorari lists the Ministry of Finance of the Republic of Indonesia ("Ministry") as a party to the proceeding in the Second Circuit. The Ministry was not a party in any manner to the proceedings concerning the anti-suit injunction at issue, neither in the District Court nor in the Second Circuit, and did not participate in those proceedings. During the execution proceedings before the Southern District of New York, the Ministry was a "non-party" with interest, as specifically recognized by the Second Circuit's decisions in the appeals of the underlying District Court judgments authorizing, respectively, attachment and then turnover. *See Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 81 (2d Cir. 2003); *Karaha Bodas Co. v. Ministry of Finance of Indonesia*, Nos. 04-6551, 04-6672, 2006 WL 565694, at *2 (2d Cir. Mar. 9, 2006). The Ministry made a limited appearance in the District Court as a non-party with interest to raise the District Court's lack of jurisdiction under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611, to execute against the Republic's

The Republic, as a sovereign state and a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, *codified at* 9 U.S.C. §§ 201-208 (the "New York Convention" or the "Convention"), has a profound interest in this case. The Republic's interest is discussed in the *amicus* brief and need not be repeated here except in summary fashion.

First, the Republic has an interest in the sanctity of the Convention's terms. The Republic considers the Second Circuit's affirming the anti-suit injunction a violation of the New York Convention because the decision impermissibly expands the jurisdictional reach of the executing court, which merely has in rem jurisdiction over the assets located in its jurisdiction that are potentially executable. As a treaty party, the Republic must object to the violation of the Convention by the organ of another State Party to the Convention.

Second, the Republic has an interest in the comity issues implicated by the Second Circuit's decision. Those issues include respect for the Cayman Islands court's determination of its jurisdiction and competence to adjudicate Pertamina's action against KBC.

Third, the Republic has an interest because the Second Circuit's decision negatively affects the ability of its state-owned enterprises to litigate

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sovereign oil and gas revenues to satisfy KBC's judgment against Pertamina – which is a separate juridical entity from the Republic.

claims that, although related, are separate and independent from the underlying arbitration award, in a forum other than the enforcing court. Most fundamentally, those claims were not raised or adjudicated by the arbitral tribunal in the underlying award.

The *amicus* brief is desirable because this Court has "long recognized the demands of comity in suits involving foreign states . . . with a coordinate interest in the litigation," and has instructed the lower courts to "take care to demonstrate due respect . . . for any sovereign interest expressed by a foreign state." *Société Nationale Industrielle Aérospatiale v. United States Dist. Court*, 482 U.S. 522, 546 (1987). Moreover, the Republic addresses the Second Circuit's decision from the perspective of a State Party to the New York Convention and a member, like the United States, of the international community of sovereign and independent nations.

This is the second time during the course of KBC's enforcement proceedings that a U.S. court has enjoined Pertamina from prosecuting an action against KBC in foreign courts. The first time, the U.S. Court of Appeals for the Fifth Circuit vacated the anti-suit injunction because it exceeded the enforcing court's powers under the Convention and violated international comity. The same outcome is warranted with respect to the Second Circuit's decision in this case.

Accordingly, the Republic of Indonesia respectfully moves this Court for leave to file the accompanying *amicus curiae* brief.

December 10, 2007

Respectfully submitted,

Carolyn B. Lamm*
Frank Panopoulos
Dana E. Foster
WHITE & CASE LLP
701 Thirteenth Street, N.W.
Washington, DC 20005
(202) 626-3600
*Counsel of Record
Counsel for the Republic of Indonesia

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Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15 (2d Cir. 1997) 7

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Other Sources

Albert Jan van den Berg, *The New York Arbitration Convention of 1958* (1981) 7, 8

American Indonesian Chamber of Commerce, Business Advantage: Indonesia, *available at* http://www.cmmc.com.au/8_13_IND07_Mining_and_Energy.pdf (2007) 15

Energy Info. Admin., Dep't of Energy, Indonesia Country Analysis Brief 2-3, *available at* http://www.eia.doe.gov/emeu/cabs/Indonesia/pdf.pdf (2007) 15

Steven R. Swanson, *The Vexatiousness of a Vexation Rule: International Comity and Antisuit Injunctions*, 30 Geo. Wash. J. Int'l L. & Econ. 1 (1997) 13

The Word Bank, Indonesia Data & Statistics, International Trade, http://siteresources.worldbank.org/INTINDONESIA/Resources/226271155529517151/Trade.xls (last visited Dec. 6, 2007) 15

INTEREST OF *AMICUS*[1]

Amicus curiae the Republic of Indonesia ("Republic") is a sovereign state and a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, *codified at* 9 U.S.C. §§ 201-208 (the "New York Convention" or the "Convention"). It has a profound interest in this case for several reasons.

First, the Republic has an interest in the sanctity of the treaty's terms and their violation by the application of the extraordinary remedy that is a foreign anti-suit injunction. As organs of a State Party to the Convention, United States courts must comply with the Convention. The Republic considers that the Second Circuit's decision exceeds that court's power under the New York Convention because the decision impermissibly expands the jurisdictional reach of the executing court.

The United States courts in this case have limited power under the Convention. As an enforcing court of secondary jurisdiction, the U.S. District Court for the Southern District of Texas is limited to conducting summary proceedings to recognize and enforce an international arbitration award, and may refuse to do so only if one of the limited grounds for refusal specified in the Convention applies. The U.S. District Court for the Southern District of New York

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity made any monetary contribution intended to fund the preparation or submission of this brief.

has even more limited power because it is the executing court with in rem jurisdiction over the assets sought to be attached. Nowhere does the Convention provide that a secondary-jurisdiction court may enjoin related proceedings, let alone an executing court, and certainly not an unrelated proceeding. Therefore, the District Court did not have the juridical competence to govern or regulate court proceedings in the Cayman Islands. Unless vacated, the Second Circuit's decision implicates the United States in a breach of its obligations owed to the Republic under the Convention and international law generally.

Second, the Republic has an interest in the international comity issues implicated by the anti-suit injunction. Those comity issues include not only respect for the obligations contained in the New York Convention by the Republic's treaty partners, but also respect for the Cayman Islands court's determination of its own jurisdiction and competence to adjudicate Pertamina's action against KBC, including KBC's defenses to that action. The Second Circuit's motivation in upholding the injunction, namely to "protect" KBC from the "legal hardships" of enforcing its judgment, *see* App. 27a, is unjustified and disguises a paternalistic attitude towards the Cayman Islands court that disregards comity.

Third, the Republic has an acute interest in this case because the anti-suit injunction prevents the Indonesian state-owned oil and gas company from resolving its separate and independent legal

claims against KBC in a legitimate, foreign forum, the Grand Court of the Cayman Islands.

As the owner of a number of state companies that do business abroad, the Republic of Indonesia is troubled that the Second Circuit's affirming the foreign anti-suit injunction negatively affects the ability of its state-owned enterprises engaged in global commerce to bring lawsuits against contract partners in their domicile, where they do business, or in whichever forum personal jurisdiction exists over the contract partner. This quite simply is not for the United States courts to dictate extraterritorially without a compelling interference with their own jurisdiction. In a time of increased global commerce and competition, the Second Circuit's decision fosters greater uncertainty for Indonesian companies that may choose to litigate claims that are separate and independent from the arbitration award in a forum other than the executing court.

SUMMARY OF THE ARGUMENT

The Second Circuit's decision affirming the anti-suit injunction violates the New York Convention. The Convention, a ratified treaty under the laws of the United States, provides very limited authority to secondary-jurisdiction courts – courts charged simply with recognizing and enforcing arbitral awards in summary proceedings according to the terms of the Convention.[2] The District Court

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[2] Professors W. Michael Reisman and Albert Jan van den Berg, the pre-eminent legal authorities on the New York Convention, both provided opinions during the enforcement proceedings on

here had even less power than the secondary-jurisdiction court because it exercised in rem jurisdiction over the assets sought to be attached in its jurisdiction pursuant to the judgment issued by the secondary-jurisdiction court, *i.e.*, the U.S. District Court for the Southern District of Texas. The District Court exceeded its authority by enjoining Pertamina from pursuing its action against KBC in the Cayman Islands. While U.S. courts may issue injunctions to protect their judgments, they may not do so in violation of the New York Convention.

The anti-suit injunction also violates principles of international comity. Comity among nations is vital to ensure international cooperation. The District Court's anti-suit injunction implicates a number of comity issues in addition to respect for reciprocal treaty rights, including: respect for the Cayman Islands court's ability to determine its own jurisdiction and competence to adjudicate Pertamina's claims and KBC's defenses; and inhibiting the Republic of Indonesia's state-owned enterprises engaged in global commerce from prosecuting actions in the legally-appropriate, foreign fora of their choice. For each of these issues, comity counsels against upholding the anti-suit injunction.

Because the anti-suit injunction is an unjustified, unnecessary, and improper restraint on the sovereign powers and prerogatives of the

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the jurisdictional scope of the primary- and secondary-jurisdiction courts. Those opinions are attached as Appendices A and B to this *Amicus* Brief.

Republic of Indonesia, and contrary to the provisions of the New York Convention, the Court must grant the petition for certiorari and vacate the injunction.

ARGUMENT

I. THE ANTI-SUIT INJUNCTION LEFT INTACT BY THE SECOND CIRCUIT IMPLICATES THE UNITED STATES IN A BREACH OF THE NEW YORK CONVENTION AS AGAINST THE REPUBLIC OF INDONESIA

A. The New York Convention Is The Law Of The United States

Ratified treaties of the United States are part of U.S. law, and U.S. courts must enforce such treaties according to their terms. U.S. Const. art. VI, cl. 2. Thus, treaties have the force and effect of congressional enactments. *See Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924) (Treaties "stand[] on the same footing of supremacy as do the provisions of the Constitution and laws of the United States . . . and [] will be applied and given authoritative effect by the courts.").

The New York Convention is a ratified treaty that was implemented by Congress in Chapter 2 of the Federal Arbitration Act. *See* 9 U.S.C. §§ 201–208. The Convention is therefore the law of the United States and has the same force of law as a federal statute. *Id.* at § 201 ("The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United

States courts in accordance with this chapter."). "Chapter 2 of the [FAA] mandates the enforcement of the New York Convention in United States courts . . . 'according to its terms over all prior inconsistent rules of law.'" *Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte*, 141 F.3d 1434, 1440 (11th Cir. 1998) (quoting *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co.*, 767 F.2d 1140, 1145 (5th Cir. 1985)).

B. A Court Called Upon To Enter A Judgment Under The Convention Has "Very Limited" Jurisdiction

The New York Convention provides for two distinct tiers of jurisdiction for the review of arbitral awards, and grants each tier "separate and limited roles." *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 373 (5th Cir. 2003) ("*Fifth Circuit Decision*"). The first tier is "primary jurisdiction." A court of primary jurisdiction is defined by the New York Convention as "a competent authority of the country in which, or under the law of which, [an] award was made" and in which that award may be "set aside or suspended." N.Y. Conv., art. V(1)(e).

The second tier of jurisdiction is "secondary or enforcement jurisdiction," in which courts are charged with reviewing the enforceability of a foreign arbitral award. Courts of secondary jurisdiction are those courts in all countries, other than the country of primary jurisdiction, where enforcement of the award is sought.

As the Second Circuit has previously noted, courts of secondary jurisdiction exercise a "very limited" jurisdiction, as they are bound to conduct summary proceedings and recognize the award unless one of the limited grounds for non-recognition and non-enforcement contained in Article V of the Convention is found. *See Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 19, 23 (2d Cir. 1997). As the pre-eminent jurist of the Convention, Albert Jan van den Berg, explains, the enforcing court's limited review does not concern the merits of the dispute, and is based on the principle of non-interference with the arbitration:

> It is a generally accepted interpretation of the Convention that the court before which the enforcement of the foreign award is sought may not review the merits of the award. . . . Furthermore, under the Convention the task of the enforcement judge is a limited one. The control exercised by him is limited to verifying whether an objection of a respondent on the basis of the grounds for refusal of Article V(1) is justified and whether the enforcement of the award would violate the public policy of the law of his country. This limitation must be seen in light of the principle of international commercial arbitration that a national court should not interfere with the substance of the arbitration.

Albert Jan van den Berg, *The New York Arbitration Convention of 1958* 269 (1981).

C. The District Court Overstepped Its Limited Role Under The Convention By Issuing The Permanent Anti-suit Injunction

The Convention serves the important purpose of promoting international commercial arbitration by creating a system that requires the State Parties to recognize and enforce foreign arbitral awards. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 (1974) ("The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries."); *Certain Underwriters at Lloyd's London v. Argonaut Ins. Co.*, 500 F.3d 571, 577 (7th Cir. 2007) ("Since its implementation, many decisions have noted that the Convention demonstrates a shared understanding of the necessity for uniform rules to facilitate efficient international arbitration."). Importantly, "[t]he utility of the Convention in promoting the process of international commercial arbitration depends upon the willingness of national courts to let go of matters they normally would think of as their own." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 639 n.21 (1985); *see also Vimar*

Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 539 (1995) ("If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements.").

Here, the District Court and the Second Circuit did not let go of matters they normally would think of as their own. The District Court was acting in a *very* limited role. The court of secondary jurisdiction was, in fact, the U.S. District Court for the Southern District of Texas. That court recognized the underlying arbitral award, reduced the award to a judgment, and ordered enforcement under the New York Convention. The District Court in New York had a much more limited role: it presided over an in rem proceeding adjudicating property rights in Indonesian oil and gas revenues located in that jurisdiction, for the purpose of ordering attachment and execution on the judgment in accordance with New York procedure.

The District Court was charged simply with identifying funds belonging to Pertamina in New York and ordering their turnover pursuant to the judgment obtained from the U.S. District Court for the Southern District of Texas. The District Court carried out this very limited role, which was made difficult and complicated by KBC's overly broad attachment strategy that tied up close to a billion dollars in revenues belonging to the Republic and not to the judgment debtor, Pertamina. In due course,

(1) the District Court identified Pertamina's funds; (2) the District Court ordered their turnover and execution; and (3) KBC dissipated those funds. Once these steps were done, the District Court's work adjudicating execution on the judgment under the Convention was complete.

But the District Court went further – further than the New York Convention and U.S. law allows – when it issued the permanent anti-suit injunction against Pertamina, barring Pertamina from pursuing its action in the Cayman Islands (or any other jurisdiction).[3] By overstepping its limited jurisdictional authority under the Convention – to adjudicate execution on assets following the judgment of the secondary jurisdiction – the District Court impinged on the jurisdiction of the Cayman Islands court to decide Pertamina's claims – claims that are separate from the issues and claims decided by the enforcing courts. In doing so, the District Court "assert[ed] [] authority not contemplated by the New York Convention." *Fifth Circuit Decision*, 335 F.3d at 373. Thus, the anti-suit injunction "threatens to upset the Convention's assignment of limited, distinct roles to national courts in the confirmation and enforcement process." *Id.* at 373 n.62.

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[3] The Second Circuit later modified the anti-suit injunction to allow Pertamina to return to the District Court and seek permission, if it chooses, to challenge the award in Switzerland, the situs of primary jurisdiction. *See Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 130 (2d Cir. 2007).

The Second Circuit paternalistically held that the District Court's judgment "is entitled to protection from Pertamina's attempts to vitiate it through the Cayman Islands action." *Karaha Bodas*, 500 F.3d at 124. Whether or not KBC is entitled to such protection, it cannot come from the executing court. That protection, if appropriate, must come from the Cayman Islands court, as a sovereign nation perfectly capable of adjudicating, or deciding not to adjudicate, Pertamina's claims and KBC's defenses. It is not the job of U.S. courts within whose jurisdiction assets are located, *i.e.*, courts with in rem jurisdiction that have even more limited roles than secondary-jurisdiction courts, to protect KBC from *all* claims relating to its investment. Indeed, not even the arbitration was so broad as to consider all claims between KBC and Pertamina.

Professor Michael Reisman addressed the alleged "protective" aspect of the injunction in his opinions to the courts below, explaining that the real issue was not protection of the enforcing court's jurisdiction but the allocation of jurisdiction under the Convention: "one must look at the treaty's allocation of jurisdiction before one moves to the powers of a particular court to protect its own jurisdiction, for in this category of cases, it is the treaty that determines whether the court has a jurisdiction in the matter." Reisman at 29a.

Nothing prevents KBC from asserting its defenses, if any, in the Cayman Islands. *See Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355, 366 (8th Cir. 2007)

(in vacating the trial court's anti-suit injunction, noting that while the resulting Japanese suit could "effectively nullify the remedy Goss legitimately procured in the United States courts," the foreign suit "[did] not threaten United States jurisdiction" or prevent Goss from seeking affirmative defenses under Japanese law); *see also Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1356 (6th Cir. 1992) ("The possibility that a holding of a Hong Kong court might permit Bankers Trust to gain control of Gau Shan is not a threat to the jurisdiction of the United States courts; rather, it is merely a threat to Gau Shan's interest in prosecuting its lawsuit.").

II. THE ANTI-SUIT INJUNCTION VIOLATES INTERNATIONAL COMITY AND IMPROPERLY INFRINGES THE REPUBLIC OF INDONESIA'S SOVEREIGNTY

A. Comity Demands That U.S. Courts Seriously Limit Anti-Suit Injunctions

Although U.S. courts have the power to enjoin foreign suits by persons subject to their jurisdiction:

> [t]he fact that the injunction operates only against the parties, and not directly against the foreign court, does not eliminate the need for due regard to principles of international comity because such an order effectively restricts the jurisdiction of the court of

> a foreign sovereign. Therefore, an anti-foreign-suit injunction should be used sparingly and should be granted only with care and great restraint.

China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 36 (2d Cir. 1987) (citations and internal quotations omitted).

"An anti-suit injunction, by its nature, will involve detailed analysis of international comity." *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 990 (9th Cir. 2006). Comity has long counseled courts to give effect, whenever possible, to the executive, legislative and judicial acts of a foreign sovereign so as to strengthen international cooperation. *See Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). Moreover, "[c]omity ordinarily requires that courts of a separate sovereign not interfere with concurrent proceedings based on the same transitory claim, at least until a judgment is reached in one action, allowing res judicata to be pled in defense." *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 939 (D.C. Cir. 1984); *see also Compagnie des Bauxites de Guinea v. Ins. Co. of N. Am.*, 651 F.2d 877, 877 (3d Cir. 1981) (holding that the fact that duplicative proceedings could be "harassing and vexatious" in nature was not sufficient to "justify the breach of comity among the courts of separate sovereigns"); Steven R. Swanson, *The Vexatiousness of a Vexation Rule: International Comity and Antisuit Injunctions*, 30 Geo. Wash. J. Int'l L. & Econ. 1, 32 (1997) ("In developing an international system for effective dispute resolution,

the *Laker* approach is probably the best a court system can adopt. . . . Injunctions and counter-injunctions cannot provide a meaningful foundation for an efficient and just international system to resolve disputes.").

Several appellate courts have agreed with the premise that "issuing an international antisuit injunction is a step that should be taken only with care and great restraint and with the recognition that international comity is a fundamental principle deserving of substantial deference." *Goss*, 491 F.3d at 360 (citing *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 18 (1st Cir. 2004) (internal quotation marks omitted); *see also Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 652 (2d Cir. 2004); *Gau Shan*, 956 F.2d at 1352 ("[I]njunctions 'restraining litigants from proceeding in courts of independent countries are rarely issued.'") (quoting *Laker Airways*, 731 F.2d at 927).

B. The Anti-Suit Injunction Implicates Several Public International Issues

First, the enjoined action in the Cayman Islands is not a purely private dispute. Pertamina is a state-owned oil and gas company, and the Republic of Indonesia has an interest in its state-owned entities' ability to litigate claims arising from their international commercial relations. Indonesian combined imports and exports in oil and liquefied natural gas have increased annually and amounted

to $46,817,000,000 in 2007.[4] Pertamina is the second-largest oil and gas producer in the Republic of Indonesia, and has plans to expand its production in the future.[5] The company also maintains joint ventures with international oil companies such as Exxon/Mobil, Statoil, Shell, and Petronas, and has further plans to work with China's Sinopec, Venezuela's Petroleos de Venezuela S.A., Iran's National Iranian Oil Refinery and Distribution Company, and certain Japanese investors.[6] Given the international scope of the Republic of Indonesia's economic expansion strategies, it is necessary that there is predictability as to its state-owned companies' ability to bring suit in a foreign forum.

Second, while couched as an act necessary to protect the judgment of a U.S. court, the anti-suit injunction, in reality, prohibits the Cayman Islands court from adjudicating claims involving the alleged conduct of its own corporation – one that chose to domicile itself there – and, therefore, interferes with the sovereign acts of that nation. *See China Trade*, 837 F.2d at 36. The injunction effectively removes

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[4] *See* The World Bank, Indonesia Data & Statistics, International Trade, http://siteresources.worldbank.org/INTINDONESIA/Resources/226271115552951715l/Trade.xls (last visited Dec. 6, 2007).

[5] *See* American Indonesian Chamber of Commerce, Business Advantage: Indonesia 13, *available at* http://www.cmmc.com.au/8_13_IND07_Mining_and_Energy.pdf (2007).

[6] *See* Energy Info. Admin., Dep't of Energy, Indonesia Country Analysis Brief 2-3, *available at* http://www.eia.doe.gov/emeu/cabs/Indonesia/pdf.pdf (2007).

the case from the competent hands of the Cayman Islands court, preventing it from determining its own jurisdiction and granting the appropriate relief.

Third, the anti-suit injunction negatively affects international commerce, which is dependent on "the ability of merchants to predict the likely consequences of their conduct in overseas markets." *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1355 (6th Cir. 1992). This predictability is harnessed, *inter alia*, by the cooperation and reciprocity between sovereigns, embodied by the New York Convention. Improper anti-suit injunctions like the one issued by the District Court, through which the courts of a jurisdiction enforcing a judgment of a secondary jurisdiction annex the judicial power of another sovereign nations' courts, make cooperation and reciprocity between courts less likely. *Id.*

Finally, the anti-suit injunction sets a dangerous precedent by allowing a court exercising in rem jurisdiction following a secondary-jurisdiction court's authorizing enforcement of its judgment to impose penalties on a party when it assumes or believes that a party is attempting to challenge the award in another country. There is no basis for such an expansive extraterritorial exercise of jurisdiction by an executing court. These comity departures, taken together, evince a lack of mutual respect for the judicial proceedings of other sovereign nations and are an affront to the sovereignty of other nations. *See Gau Shan*, 956 F.2d at 1354 ("The days of American hegemony over international economic

affairs have long since passed. The United States cannot today impose its economic will on the rest of the world and expect meek compliance, if indeed it ever could.").

C. International Comity Requires That The Anti-Suit Injunction Be Vacated

Given the New York Convention's carefully crafted tiers of primary and secondary jurisdiction, the anti-suit injunction issued by the executing court preventing Pertamina from exercising its right under Cayman Islands law to pursue its action is a grave breach of the respect and deference that co-equal sovereigns owe each other, and a direct breach of the New York Convention. An executing court has no power under the Convention to assess the underlying award. The executing court is not the secondary-jurisdiction court that recognizes and authorizes enforcement of the award, and it is not otherwise entitled to such a prerogative.

The Cayman Islands has both the right and the obligation under international law to provide a judicial forum for the resolution of claims related to a corporation organized under its laws. Pertamina has the right to invoke and rely on the Cayman Islands' procedures to prosecute an action against KBC on alleged claims not considered by the courts below or in the arbitration. Further, the United States has an obligation to respect the right and obligation of the Cayman Islands courts to hear and decide the issues of Cayman Islands law, not only as

a matter of comity, but also because the international treaty on which the jurisdiction of U.S. courts in this case depends requires that result. *See Gau Shan*, 956 F.2d at 1355 ("Antisuit injunctions . . deny foreign courts the right to exercise their proper jurisdiction. Such action conveys the message, intended or not, that the issuing court has so little confidence in the foreign court's ability to adjudicate a given dispute fairly and efficiently that it is unwilling even to allow the possibility."). The courts of this country must respect the decisions of, and the ongoing process in, the Cayman Islands court. They must leave the Cayman Islands court "free to perform their separate functions in their separate ways." *Younger v. Harris*, 401 U.S. 37, 44 (1971). To hold otherwise is to violate the New York Convention and to restrict without justification the proper exercise of a sovereign nation's jurisdiction.

CONCLUSION

For the foregoing reasons, the Republic of Indonesia urges this Court to grant the petition for certiorari and ultimately to reverse the Second Circuit's decision and vacate the anti-suit injunction enjoining Pertamina from pursuing its action in the Cayman Islands.

December 10, 2007

Respectfully submitted,

Carolyn B. Lamm*
Frank Panopoulos
Dana E. Foster
WHITE & CASE LLP
701 Thirteenth Street, N.W.
Washington, DC 20005
(202) 626-3600

*Counsel of Record

Counsel for the Republic of Indonesia

No. 07-619

In the Supreme Court of the United States

PT PERTAMINA (PERSERO), FKA PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA, PETITIONER

v.

KARAHA BODAS COMPANY, L.L.C.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

PAUL D. CLEMENT
Solicitor General
Counsel of Record
GREGORY G. KATSAS
Acting Assistant Attorney General
THOMAS G. HUNGAR
Deputy Solicitor General
TOBY J. HEYTENS
Assistant to the Solicitor General
MICHAEL RAAB
SHARON SWINGLE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the satisfaction of a money judgment divests a federal district court of subject matter jurisdiction to maintain an antisuit injunction designed to prevent the losing party from seeking to reverse the results of that judgment.

2. Whether the district court properly exercised "secondary jurisdiction" under the convention governing enforcement of international arbitration awards when it issued a foreign antisuit injunction in the circumstances of this case.

3. Whether the courts below gave proper weight to considerations of international comity in issuing a foreign antisuit injunction in the circumstances of this case.

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In the Supreme Court of the United States

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v.

KARAHA BODAS COMPANY, L.L.C.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. The United States is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention or Convention), *adopted* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3,[1] which governs "recognition and enforcement of arbitral awards * * * not considered as domestic awards in the State

[1] Subsequent citations will be to the text of the New York Convention as reproduced in the appendix to the petition for a writ of certiorari. Pet. App. 287a-297a.

where their recognition and enforcement are sought." Art. I(1) (Pet. App. 287a-288a). Article V of the Convention describes the situations in which a court may refuse to enforce a foreign arbitral award. It expressly contemplates that an award may be "set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made" under standards set forth in such nation's domestic law. Art. V(1)(e) (Pet. App. 291a); see *id.* at 175a-176a. If such an authority—which the Second Circuit denominated a "primary" jurisdiction—sets aside or suspends an award, courts in so-called "secondary" jurisdictions "may" refuse to enforce it. *Id* at 103a; see Art. V(1)(e) (Pet. App. 290a-291a). But if an arbitration award has "become binding on the parties" and not been annulled by a tribunal having "primary" jurisdiction, courts in "secondary" jurisdictions may refuse to enforce it only if one of six other exceptions set forth in the New York Convention is applicable. Art. V(1)(e) (Pet. App. 290a-291a).

2. Petitioner, an oil and gas company owned by the Republic of Indonesia, and respondent, a Cayman Island corporation, entered into a joint venture to develop natural energy resources in Indonesia. Pet. App. 4a. The parties agreed that any disputes would be settled through arbitration in Switzerland. *Ibid.* Respondent commenced arbitration after the Indonesian government suspended the project on which the parties had agreed to collaborate. *Ibid.* In 2000, a Swiss arbitration panel awarded respondent $261.1 million in damages, lost profits, and costs (2000 arbitration award). *Id.* at 5a, 48a. Petitioner challenged the 2000 arbitration award in the Swiss courts, but its petition was dismissed because petitioner failed to pay the required fees. *Id.* at 5a. The

Swiss courts denied petitioner's request for reconsideration. *Ibid.*

3. a. Respondent sought enforcement of the 2000 arbitration award in the United States District Court for the Southern District of Texas, which entered an order confirming the award. Pet. App. 243a-286a. Petitioner appealed, but failed to post a supersedeas bond, and the district court entered orders permitting respondent to begin executing on the judgment in the United States. *Id.* at 160a. Respondent also commenced enforcement proceedings in Canada, Hong Kong, and Singapore, eventually obtaining $898,682.90 in Hong Kong. *Id.* at 51a.

b. While its Fifth Circuit appeal was pending, petitioner filed a new action in Indonesia, seeking annulment of the 2000 arbitration award and an injunction against its enforcement. Pet. App. 161a. The Texas district court issued a preliminary injunction that barred petitioner from taking any steps to prosecute the Indonesian action. *Id.* at 163a. The Indonesian trial court rejected petitioner's request to stay the Indonesian litigation. *Ibid.* In a later order, it concluded that it had "primary" jurisdiction under the New York Convention, annulled the 2000 arbitration award, permanently enjoined respondent from seeking to enforce it, and imposed a fine of $500,000 for each day respondent violated the injunction. *Id.* at 164a.

c. The Fifth Circuit vacated the preliminary injunction entered by the Texas district court. Pet. App. 155a-192a. The court reasoned that because the New York Convention "provides for multiple simultaneous proceedings, it is difficult to envision how court proceedings in Indonesia could amount to an inequitable hardship" on respondent. *Id.* at 176a. It also stated that it was

"uncertain" whether respondent would suffer serious "financial hardship" absent an injunction, because petitioner "ha[d] promised the district court that it w[ould] not pursue enforcement of the Indonesia injunction," there was "no record evidence that [respondent] ha[d] substantial assets in Indonesia," and it was "extremely unlikely" that any foreign court would enforce the Indonesian court's sanctions order. *Id.* at 177a.

The Fifth Circuit further concluded that the Indonesian action would not "frustrate and delay the speedy and efficient determination" of the United States proceedings or "threaten the integrity of the district court's jurisdiction or its Judgment enforcing the [2000 arbitration a]ward." Pet. App. 179a-180a. The court of appeals noted that United States "courts have discretion under the [New York] Convention to enforce an award despite annulment in another country, and have exercised that discretion in the past." *Id.* at 179a. It also determined that the Indonesian proceedings "would not precisely duplicate" those that took place in the United States, in part because "to any extent that the Indonesian courts might be acting as legitimate courts of primary jurisdiction, such courts would have domestic law grounds on which to analyze the propriety of" the award. *Id.* at 180a. Balancing "the scant vexatiousness and oppressiveness of [petitioner's] acts" against "the not insubstantial interests in preserving international comity," *id.* at 181a, the court of appeals determined that "the better course for [United States] courts to follow is to avoid the appearance of reaching out to interfere with the judicial proceedings in another country and to avoid stepping too far outside [their] limited role under the Convention," *id.* at 188a-189a.

d. In March 2004, the Indonesian Supreme Court vacated the orders of the Indonesian trial court, concluding that only the Swiss courts had authority to annul the 2000 arbitration award. Pet. App. 8a. Later that month, the Fifth Circuit affirmed the Texas district court's order confirming the award, as well as two subsequent orders denying petitioner's motions for relief from that judgment pursuant to Federal Rule of Civil Procedure 60(b). *Id.* at 88a-154a. This Court denied certiorari. 543 U.S. 917 (2004).

4. a. The current proceedings began in 2002, when respondent registered the Texas judgment in the United States District Court for the Southern District of New York. Pet. App. 9a-10a. On March 9, 2006, the Second Circuit affirmed an order directing the transfer of funds from certain New York bank accounts sufficient to satisfy the remainder of the 2000 arbitration award. *Id.* at 11a.

b. On September 15, 2006, petitioner filed an action against respondent in the Cayman Islands, claiming that the 2000 arbitration award had been procured by fraud. Pet. App. 12a. Petitioner sought restitution of "all sums received by [respondent] pursuant to the Arbitral Award (and its enforcement)," as well as an injunction prohibiting respondent from disposing of "any sums received or to be received by [respondent] pursuant to any order of" the New York district court. *Id.* at 12a-13a.

c. On October 2, 2006, this Court denied a writ of certiorari to consider the Second Circuit's March 9, 2006, decision. 127 S. Ct. 129. On November 29, 2006, the last of the funds were turned over to respondent. Pet. App. 12a n.5.

d. On December 8, 2006, the district court enjoined petitioner "from pursuing the Cayman Islands action or

any similar action in any court." Pet. App. 86a. It also entered a declaratory judgment stating that respondent "has full right to dispose of" the funds it received pursuant to the district court's judgment and had "no obligation to comply with" any order purporting to restrain its right to do so. *Id.* at 87a. The district court determined that "the entire point of the fraud allegations [in the Cayman Islands] is to show that the Arbitral Award must be deemed to be vitiated," *id.* at 65a, and to "nullify[]" and "prevent the completion and consummation of the carrying out of" the previous federal judgments confirming and enforcing the 2000 arbitration award, *id.* at 67a-68a.

e. The district court stayed its decision pending appeal. Pet. App. 15a. On February 13, 2007, the court of appeals granted respondent's motion to lift the stay, *ibid.*, and Justices Ginsburg and Kennedy denied petitioner's application to reinstate it, No. 06A790 (Feb. 14, 2007). Respondent then distributed substantially all of the remaining funds to its shareholders. Pet. App. 15a.

5. The court of appeals affirmed the district court's grant of permanent injunctive relief. Pet. App. 1a-41a. As "threshold requirements," the Second Circuit determined that "'the parties are the same in both matters'" and that "'resolution of the case before the enjoining court is dispositive of the action to be enjoined.'" *Id.* at 16a (citation omitted). It noted that two federal district courts had confirmed and enforced the 2000 arbitration award despite petitioner's argument "in the Swiss arbitration that the resource and development estimates prepared by [respondent] were fraudulent," and that "the Fifth Circuit, in affirming the [Texas district court's order], rejected [petitioner's] argument that enforcement of the Award should be refused because it

was procured by fraud." *Id.* at 22a-23a. The court of appeals concluded that petitioner's "new factual allegations" were "not sufficient to undermine the preclusive effect of several earlier federal court decisions that (1) the Award should be enforced and (2) [respondent] is entitled to [petitioner's] New York funds in an amount sufficient to satisfy the Award." *Id.* at 24a.

The court of appeals also rejected petitioner's contention that the previous federal judgments could not be dispositive of the Cayman Islands action because those courts had been acting as "secondary" jurisdictions under the New York Convention. Pet. App. 26a. It "agree[d] with the Fifth Circuit that federal courts should not attempt to protect a party seeking enforcement * * * 'from *all* of the legal hardships' associated with foreign litigation" and "cannot dictate to other 'secondary' jurisdictions * * * whether the award should be confirmed or enforced in those jurisdictions." *Id.* at 27a (quoting *id.* at 178a). But the court of appeals determined that the subsequent entry of a final judgment ordering petitioner to turn over certain identifiable funds, as well as the nature of the Cayman Islands action, distinguished the district court's injunction from the preliminary injunction vacated by the Fifth Circuit. *Id.* at 28a-29a. The court explained that whereas petitioner "had an arguable—though ultimately meritless—basis for claiming that the Indonesian proceedings were permissible under the New York Convention," petitioner had not even "attempt[ed] to argue that the Cayman Islands action is one that would be contemplated by the Convention." *Id.* at 29a-30a.

The court of appeals held that various additional factors likewise supported an antisuit injunction. Pet. App. 31a-35a. It began with two factors having "greater sig-

nificance"—"whether the foreign action threatens the jurisdiction or the strong public policies of the enjoining forum"—and found them both present. *Id.* at 32a. The court also concluded that another factor—"whether the foreign action would be vexatious—counsel[ed] strongly in favor of the injunction," because "the entire point of" the Cayman Islands action was to challenge an arbitral award that had been confirmed and enforced by United States courts in proceedings in which petitioner could have, but had not, raised its current objections. *Id.* at 33a (quoting *id.* at 65a).

The court of appeals stressed that comity concerns "have particular importance under the Convention," and that "a federal court should be wary of entering injunctions that may prevent parties from engaging" in "proceedings that are contemplated by the Convention." Pet. App. 35a. But it stated that comity considerations "have 'diminished force' when a court has already reached a judgment involving the same issues and parties," and that "comity concerns under the Convention have no bearing on our consideration of the Cayman Islands action, which is not a proceeding contemplated by the Convention and is * * * intended to undermine federal judgments." *Id.* at 34a-35a (citation omitted).

Finally, the court of appeals rejected petitioner's assertion that the satisfaction of the money judgment had divested the district court of jurisdiction to maintain the antisuit injunction. Pet. App. 35a. The Second Circuit acknowledged that the Eighth Circuit had cited both "jurisdictional circumstances and comity considerations" in reversing a district court's grant of a foreign antisuit injunction in a situation where "there [wa]s no longer an outstanding judgment to protect." *Id.* at 37a (brackets in original) (quoting *Goss Int'l Corp.* v. *Man*

Roland Druckmaschinen Aktiengesellschaft, 491 F.3d 355, 368 (2007), petition for cert. pending, No. 07-618 (filed Oct. 15, 2007) (*Goss*)).[2] The Second Circuit concluded, however, that "federal courts have continuing jurisdiction * * * to enjoin a party properly before them from relitigating issues in a non-federal forum that were already decided in federal court," and that "[t]his source of jurisdiction remains even after a judgment has been satisfied." *Id.* at 38a. The court of appeals agreed with *Goss* that "a federal court may in some circumstances * * * have a diminished need for an anti-suit injunction to protect a judgment once ancillary proceedings to satisfy the judgment have run their course." *Id.* at 40a n.19. But it determined that such circumstances were "not presented here," because, "[w]ere we to vacate the District Court's injunction, [petitioner] would be free to engage in vexatious proceedings * * * intended to undermine or vitiate federal judgments." *Id.* at 40a & n.19.

DISCUSSION

The court of appeals' decision is correct and does not warrant further review. The transfer of funds to respondent pursuant to an order of the district court did not divest the court of subject matter jurisdiction to ensure that that very transfer would not subsequently be undone. In addition, it was appropriate for the district court to enjoin petitioner from pursuing litigation that was by its terms designed to undo the results of final federal judgments.

Although the Second Circuit's jurisdictional holding may conflict with the Eighth Circuit's decision in *Goss*,

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[2] Subsequent citations will be to the appendix to the petition for a writ of certiorari in *Goss* (*Goss* Pet. App.).

the scope of any conflict is narrow and uncertain, and involves an issue that does not appear to arise frequently. The only proffered ground for review of the second question presented is a purported conflict between decisions issued in this litigation, but the court below plausibly distinguished the Fifth Circuit's earlier decision. Finally, although the courts of appeals have employed different formulations regarding the standards for issuing foreign antisuit injunctions, it is not clear that those differences in language have actually translated into different results, and an injunction would be warranted here even under the strictest formulation.

A. The Decision Below Is Correct

1. The transfer of funds sufficient to satisfy the district court's judgment did not divest that court of subject matter jurisdiction to maintain an antisuit injunction. Rather, this Court's decisions make clear that the district court possessed authority to restrain petitioner from prosecuting another action that sought to nullify or evade its previous judgment.

In *Dietzsch* v. *Huidekoper*, 103 U.S. 494 (1880), a replevin action originally filed in state court was properly removed to federal court after the plaintiffs had obtained possession of the property by posting a replevin bond. *Id.* at 496; see *Kern* v. *Huidekoper*, 103 U.S. 485, 486-490 (1880). Despite the valid removal, both courts proceeded to adjudicate the action, with the state court entering judgment for the defendant and the federal court entering judgment for the plaintiffs, thereby confirming their right to continued possession of the replevied property. *Id.* at 489. The defendant then brought a further action in state court to collect the replevin bond, see *id.* at 486—that is, "to enforce the

judgment of [the state] court in the replevin suit" by obtaining relief that was "equivalent to an actual return of the replevied property." *Dietzsch*, 103 U.S. at 497. This Court held that the federal court had authority to enjoin the defendant from prosecuting the second state court suit. The Court described the request for the injunction as "ancillary" and "auxiliary to" the earlier federal action, and stated that a federal court "has the right to enforce [its] judgment against the party defendant and those whom he represents, no matter how or when they attempt to evade it or escape its effect." *Id.* at 497-498.

Dietzsch is controlling here. The purpose of the district court's injunction was "to enforce its own judgment by preventing the defeated party from wresting" away from respondent "the substantial fruits of a judgment rendered in [its] favor." *Dietzsch*, 103 U.S. at 497-498. To conclude that the district court lacked jurisdiction to maintain an injunction following transfer of the funds would mean that the final judgment "settle[d] nothing" and leave respondent "under the necessity of engaging in a new conflict elsewhere." *Id.* at 498. Such a "result would have shown the existence of a great defect in our Federal jurisprudence, and have been a reproach upon the administration of justice." *French* v. *Hay*, 89 U.S. 250, 253 (1874).

Petitioner seeks to distinguish *Dietzsch* on the ground that the earlier federal judgment in that case was an "ongoing order[] in need of continued protection." Pet. 19. But the order was "ongoing" only in the sense that it awarded property to one party at the expense of another, which is equally true here.

Nor have later decisions undermined *Dietzsch*'s holding.[3] In 1934, the Court described it as "well settled" that "a federal court of equity has jurisdiction of a bill ancillary to an original case * * * to secure *or preserve* the fruits and advantages of a judgment or decree rendered therein," regardless of whether the original judgment was "at law or in equity" and "irrespective of whether the court would have jurisdiction if the proceeding were an original one." *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 239 (1934) (emphasis added); accord *Dugas* v. *American Surety Co.*, 300 U.S. 414, 415-422, 428 (1937) (recognizing jurisdiction to enjoin a litigant from prosecuting a state court action that was, in substance, an attempt to impose liability on a surety that had previously been granted a full release in a federal interpleader action). More recently, the Court has stated that a court's power to "vindicate its authority" and "effectuate its decrees" extends to restricting actions that "flout[] or imperil[]" the court's judgment, *Kokkonen* v. *Guardian Life Ins. Co.*, 511 U.S. 375, 380 (1994), and that the doctrine of ancillary jurisdiction preserves "a federal court's inherent power to enforce its judgments." *Peacock* v. *Thomas*, 516 U.S. 349, 356 (1996).

Petitioner cites (Pet. 20) *Peacock*'s statement that this Court's approval of ancillary enforcement jurisdiction "has not * * * extended beyond attempts to execute, or to guarantee eventual executability of, a federal

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[3] In *Riggs* v. *Johnson County*, 73 U.S. (6 Wall.) 166 (1867), which was decided before *Dietzsch*, the Court rejected the view that "the jurisdiction of a [federal] court is * * * exhausted by the rendition of the judgment," and held that jurisdiction "continues until that judgment shall be satisfied." *Id.* at 187. Because the issue was not before it, *Riggs* had no occasion to consider whether a federal court's jurisdiction invariably *terminates* upon formal satisfaction of a judgment.

judgment." 516 U.S. at 357. The Court has never held, however, that formal execution extinguishes a district court's authority to take *any* further steps to protect the efficacy of its judgments. To the contrary, the Court has reaffirmed that a court's ancillary jurisdiction may extend past satisfaction of a money judgment in certain circumstances. See, *e.g.*, *United States* v. *Beggerly*, 524 U.S. 38, 45-47 (1998) (acknowledging ancillary jurisdiction to set aside judgment procured by fraud); *Pacific R.R.* v. *Missouri Pac. Ry.*, 111 U.S. 505, 506-507, 521-522 (1884) (same). Although in the normal course satisfaction of the judgment will extinguish the material threats to the judgment, nothing in this Court's cases suggests a lack of authority to protect a judgment from extraordinary challenges of the type attempted here. *Peacock* itself simply held that a district court lacked ancillary jurisdiction over "a subsequent lawsuit" against "a person not already liable for [an existing federal] judgment" where the new liability would be founded "upon different facts" and "entirely new theories of liability." *Peacock*, 516 U.S. at 357-358.

2. The court of appeals correctly held that the district court did not abuse its discretion in granting an antisuit injunction. Comity considerations should play a substantial role when a federal court is asked to enjoin a party from engaging in litigation in a foreign forum, and such injunctions should "'be "used sparingly" and granted only with care and great restraint.'" Pet. App. 17a (citations omitted). In the unusual circumstances of this case, however, a foreign antisuit injunction was appropriate.

Reduced to their essence, the federal judgments that the antisuit injunction seeks to protect establish that: (a) the 2000 arbitration award will be enforced in the

United States; and (b) as a result, respondent has a superior claim on certain funds that were formerly held in New York bank accounts. In the Cayman Islands action, petitioner sought a determination that the award upon which the United States judgments were based was "vitiat[ed]" by fraud, and a return of "all sums received by [respondent] pursuant to the Arbitral Award (and its enforcement)." Pet. App. 12a-13a. Because "[a]lmost the entire judgment debt (99 7/10%) was paid from funds restrained in the federal court in New York, in proceedings based on the judgment of the federal court in Texas," *id.* at 79a, it is clear that "the entire point" of the Cayman Islands action is to overturn the results of the United States proceedings, *id.* at 33a. "[C]onsiderations of comity have diminished force" in those circumstances, *Paramedics Electromedicina Comercial, Ltda.* v. *GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 655 (2d Cir. 2004), and a United States court typically has a significant interest in vindicating its own final judgments against collateral attacks designed to nullify or effectively reverse them.[4]

The antisuit injunction here is also supported by the strong public policies favoring the orderly processing of litigation and the finality of judgments. Petitioner had the opportunity to present any substantive defenses to the Swiss arbitration panel. Pet. App. 4a. Petitioner presented a fraud defense, but it was rejected by the

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[4] The United States disagrees with the suggestion that the New York district court "had a much more limited role" than the Texas district court. Republic of Indonesia Amicus Br. 9. A registered judgment has "the same effect as a judgment of" the court in which it is registered "and may be enforced in like manner." 28 U.S.C. 1963. Accordingly, the district court's authority to issue the injunction derives from "all of the federal judgments related to the case." Pet. App. 22a.

arbitrators. *Id.* at 4a-5a. Petitioner also had the opportunity to seek further review within the Swiss system, but failed to comply with the filing-fee requirement. *Id.* at 5a. And despite acknowledging that it had possession of the documents on which the Cayman Islands action was based no later than November 2002 (Pet. 8), petitioner did not seek to raise its current allegations in either the Fifth Circuit confirmation litigation, which ended in 2004, or the Second Circuit enforcement litigation, which ended in 2006. Pet. App. 78a-79a.

The policies underlying the New York Convention likewise support an antisuit injunction in this case, and further diminish the weight of the comity concerns cited by petitioner. The Convention strongly favors the use of arbitration as a means to settle disputes efficiently and quickly. The Supreme Court of Indonesia—the only other possible "primary" jurisdiction with respect to the 2000 arbitration award—concluded that only the Swiss courts would have authority to set aside or annul that award. Pet. App. 8a. Accordingly, permitting petitioner to pursue the Cayman Islands action "would tend to undermine the regime established by the Convention for recognition and enforcement of arbitral awards." *Id.* at 30a.

B. Further Review Is Not Warranted

For the reasons explained above, the lower courts reached the correct result in this case. Further review is not warranted.

1. The first question presented involves a narrow issue: whether the transfer of funds sufficient to satisfy an underlying money judgment divests a district court of jurisdiction to maintain an antisuit injunction. In *Goss*, the Eighth Circuit cited "jurisdictional circum-

stances and comity considerations" as the basis for concluding that, "under the facts of th[at] case, the maintenance of [an] antisuit injunction on a satisfied judgment could not be justified." *Goss* Pet. App. 28a-29a. Although the scope of *Goss*'s holding is unclear, the decision can plausibly be read as stating that a federal court lacks jurisdiction to maintain an antisuit injunction if its judgment awarded only monetary relief and has been fully satisfied. See U.S. Amicus Br. at 14, *Goss*, *supra* (No. 07-618) (*Goss* Br.). Under that reading of *Goss*, its jurisdictional holding would conflict with the Second Circuit's decision in this case.

On the other hand, there is language in *Goss* that could be viewed as limiting its jurisdictional holding to situations in which the new proceeding is "'entirely new and original'" and involves issues that "are not the same" as those in the completed federal proceeding. *Goss* Pet. App. 22a-23a (citation omitted); see *Goss* Br. 13-14. If that reading were correct, there would be no conflict, because the court below limited its jurisdictional holding to injunctions that bar a party "from relitigating issues in a non-federal forum that were *already decided in federal court*." Pet. App. 38a (emphasis added).

In any event, the potential conflict between *Goss* and the decision below does not merit further review at this time. Any conflict is of recent vintage and involves only two circuits. The parties have cited no other appellate decisions addressing the narrow question of ancillary jurisdiction at issue here, and thus it appears that the question arises infrequently. Moreover, it remains to be seen whether the Eighth Circuit will apply the jurisdictional rule enunciated in *Goss* even when, as here (but unlike in *Goss*), the court recognizes that the action to

be enjoined constitutes an attempted re-litigation of the earlier suit.

2. The second question involves the permissibility of an antisuit injunction when a district court is acting as a "secondary" jurisdiction under the New York Convention. Petitioner has not identified any federal court decisions addressing that question other than those issued in connection with this litigation. That fact alone suggests that the issue may not be of recurring importance.

Petitioner asserts (Pet. 22-30) that the Second Circuit's affirmance of the injunction entered by the Southern District of New York conflicts with the Fifth Circuit's vacatur of the preliminary injunction entered by the Southern District of Texas. Petitioner acknowledges that the Second Circuit distinguished, rather than disagreed with, the Fifth Circuit's decision, but contends that the reasons given by the Second Circuit cannot withstand scrutiny. Pet. 26-29.

That dispute over the best reading of a prior decision in this litigation self-evidently does not warrant this Court's review. The Second and Fifth Circuits both *rejected* petitioner's claim that the New York Convention categorically bars a "secondary" jurisdiction from issuing a foreign antisuit injunction. Pet. App. 28a, 168a-169a. Both courts likewise agreed that a federal court should not attempt to protect respondent "from all the legal hardships it might undergo in a foreign country." *Id.* at 178a; see *id.* at 27a. But, as the Second Circuit explained, "it does not follow" that "a federal court cannot protect a party who is the beneficiary of a federal judgment enforcing a foreign arbitral award from *any* of the legal hardships that a party seeking to evade enforcement of that judgment might seek to impose." *Ibid.* Nor did the Fifth Circuit say anything to the con-

trary. In fact, it gave a lengthy explanation of why it was "uncertain whether the financial hardship about which [respondent] complains will ever materialize," *id.* at 177a.

Contrary to petitioner's suggestion (Pet. 28), the Second Circuit *did* explain why the district court's turnover order was different from the Texas district court's confirmation order. Whereas an annulment of the 2000 arbitration award by an Indonesian court would not have precluded that award from being enforced in the United States, see Pet. App. 179a, a key purpose of the Cayman Islands action was to undo the New York district court's "definitive determination that [respondent] was entitled to the funds that [petitioner] held in the New York bank accounts." *Id.* at 28a. Petitioner also asserts (Pet. 28) that the fact that Indonesia had a "colorable argument" to being a "primary" jurisdiction "was not a factor in [the Fifth Circuit's] decision." That argument is belied by the Fifth Circuit's reference to that possibility as one reason why "the duplication inherent in the Indonesian proceeding is less problematic than it might be otherwise," Pet. App. 180a, as well as its expression of concern that the Texas district court's reasoning might be seen as authority for a court in a "secondary" jurisdiction "to enjoin proceedings in countries with arguable primary jurisdiction," *id.* at 186a.

3. The third question presented involves the proper standards for granting foreign antisuit injunctions. Although the courts of appeals have enunciated different verbal formulations of the proper test, it appears that all give weight to comity concerns, and it is not clear that the different formulations have actually produced different results in cases with comparable facts. See, *e.g.*, *E. & J. Gallo Winery* v. *Andina Licores S.A.*, 446 F.3d

984, 995 (9th Cir. 2006) (stating that although "[t]here may be different views among circuits as to the relative importance to be given to comity in deciding whether to file an anti-suit injunction," it was unnecessary to "express [an] opinion on these possible differences" because "in this case, an anti-suit injunction would be appropriate under any test"); *Philips Med. Sys. Int'l B.V.* v. *Bruetman*, 8 F.3d 600, 605 (7th Cir. 1993) (declining to "make a definitive choice" regarding the proper standard "or even decide whether the differences between the standards are more than verbal, that is, whether they ever dictate different outcomes," because an injunction was warranted "even under the more demanding standard"). And even assuming that the different formulations will produce materially different outcomes, this case would not be a suitable vehicle for choosing among them, because an injunction would be appropriate here under any of those formulations and because this case arises in an unusually complex and multifaceted procedural setting.

Petitioner contends (Pet. 32-36) that what has generally been described as a two-way conflict between "liberal" and "conservative" approaches is, in reality, a three-way conflict. According to petitioner, whereas the Third, Sixth, and Eighth Circuits permit consideration of *only* two factors—*i.e.*, whether there is a threat to the forum court's own jurisdiction or a need to protect important public policies—the First, Second, and D.C. Circuits "permit consideration of other factors." Pet. 33-34.

It is not clear that there is actually a three-way conflict regarding the proper formulation. The Third, Sixth, and Eighth Circuits have expressly aligned their approaches with that of the Second Circuit. See *Goss* Pet. App. 8a, 11a; *General Elec. Co.* v. *Deutz*, 270 F.3d

144, 160-161 (3d Cir. 2001); *Gau Shan Co.* v. *Bankers Trust Co.*, 956 F.2d 1349, 1352-1354 (6th Cir. 1992). In addition, the Third Circuit has stated that, under "the more restrictive standard," "[v]exatiousness and inconvenience to the parties carry far less weight," which is consistent with the Second Circuit's statement here that courts should afford "greater significance" to "whether the foreign action threatens the enjoining forum's jurisdiction or its strong public policies." Pet. App. 17a (internal quotation marks and citation omitted).

The Sixth Circuit has stated that an antisuit injunction may not be "based upon" factors like "vexatiousness," "oppressiveness," or a "race to judgment," and that considerations of international comity "preclude[] the issuance of an antisuit injunction" *unless* a federal court's "jurisdiction is * * * threatened" or "important public policies [are] being evaded." *Gau Shan*, 956 F.2d at 1355, 1358; accord *Goss* Pet. App. 8a (stating that "a foreign antisuit injunction will issue only if the movant demonstrates (1) an action in a foreign jurisdiction would prevent United States jurisdiction or threaten a vital United States policy, and (2) the domestic interests outweigh concerns of international comity"). But because *Gau Shan* and *Goss* both concluded that there was no need to protect jurisdiction or important public policies in those cases, see *Gau Shan*, 956 F.2d at 1355-1358; *Goss* Pet. App. 20a-25a, they had no occasion to decide whether other considerations have a role to play where one or both of those factors is satisfied. And given the inherently flexible, equitable nature of the injunction inquiry, it is unreasonable to assume that those courts intended to adopt a categorical prohibition against consideration of other factors. Cf. *eBay Inc.* v. *MercExchange L.L.C.*, 547 U.S. 388 (2006).

Whether there are ultimately two or three competing standards, the antisuit injunction in this case would be sustained under any of them. *Gau Shan* states that "a foreign antisuit injunction should issue only when the foreign proceeding 1) threatens the jurisdiction of the United States court, *or* 2) evades strong public policies of the United States." 956 F.2d at 1354 (emphasis added); accord *Goss* Pet. App. 8a (also framing threshold requirements as disjunctive); *Deutz*, 270 F.3d at 161 (same). Because the courts below concluded that *both* bases for imposing an antisuit injunction were present here, Pet. App. 32a-33a, 72a-86a, petitioner could not prevail even under its own proposed standard without overcoming each of those case-specific determinations.[5] Petitioner states that the "typical[]" threat-to-jurisdiction cases involved situations where "the foreign court threatened to prevent the domestic court from rendering judgment or to carve out exclusive jurisdiction," Pet. 37, but that is not the same as asserting that the Second Circuit's holding conflicts with the decisions of another court of appeals.[6] In addition, petitioner's disagreement

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[5] Petitioner suggests (Pet. 38) that the Second Circuit "might well have reached a different result" had it not considered the "vexatiousness" of petitioner's conduct, but petitioner's suggestion rests on two dubious premises. The first is discussed and rejected in the preceding paragraph—*i.e.*, that courts applying the most "conservative" standard would not permit consideration of vexatiousness even *after* a threat was shown to the enjoining court's jurisdiction or public policies. The second is the highly implausible assumption that a court that looked *only* to those two factors and ignored vexatiousness would decline to issue an injunction even when, as here, *both* factors were present.

[6] *Goss* stated that even though a judgment in the foreign proceeding "would effectively nullify the remedy Goss legitimately procured in the United States," such a prospect "d[id] not threaten United States jurisdiction." *Goss* Pet. App. 25a. The Eighth Circuit did not explain

with the Second Circuit's conclusion that permitting the Cayman Islands action to proceed would threaten strong public policies of the United States (Pet. 38) is simply a retread of its erroneous contention that the lower courts failed to apply correctly the policies underlying the New York Convention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

GREGORY G. KATSAS
Acting Assistant Attorney General

THOMAS G. HUNGAR
Deputy Solicitor General

TOBY J. HEYTENS
Assistant to the Solicitor General

MICHAEL RAAB
SHARON SWINGLE
Attorneys

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the basis for that statement, but it appears to have derived from the court's earlier conclusion that "[t]he issues previously decided below * * * are different from the issues sought to be litigated in the foreign jurisdiction." *Id.* at 23a. Although that fact-bound conclusion was erroneous, see *Goss* Br. 12-13, the important point is that here, unlike in *Goss*, the court of appeals concluded that the 2000 arbitration award, "and the federal judgments confirming and enforcing it, actually decided the claims raised in the Cayman Islands action." Pet. App. 22a.